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IN THE

Supreme Court of the United States

October Term, 1960

No. 516

RIDGWAY NATIONAL BANK, BRUCE ISAACSON and JOHN BELL, Successor Trustees under the Will of N. T. Arnold,
Appellants

v.

COMMONWEALTH OF PENNSYLVANIA,
Appellees

On Appeal from Ridgway National Bank, Bruce Isaacson and John Bell, Successor Trustees under the Will of N. T. Arnold from the Supreme Court of Pennsylvania

JURISDICTIONAL STATEMENT

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JURISDICTIONAL STATEMENT

Opinions Below

The majority and dissenting opinions of the Supreme Court of Pennsylvania are reported in 406 Pa. 261 and in

the Atlantic Reporter at 161 A. 2d 390 and copies of the same are appended hereto as Appendix A. A copy of the Order of the Supreme Court of Pennsylvania refusing appellant's Petition for Reargument is appended hereby as Appendix B.

Statement of the Grounds on Which Jurisdiction is Invoked

This action was brought under the law of Pennsylvania to determine the ownership of natural gas underlying certain tracts of land. In the determination of the ownership of the natural gas, the validity of the Act of March 9, 1832, P. L. 190, Sections 31-34 and 57, of the Commonwealth of Pennsylvania was drawn into question.

The original Decree of the Supreme Court of Pennsylvania was dated April 18, 1960. The appellants' petition for a reargument was denied in an order filed June 27, 1960. Notice of appeal was filed in the Supreme Court of Pennsylvania on September 7, 1960.

The jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by Title 28, U. S. C. Section 1257 (2).

The cases which sustain the jurisdiction are: *Missouri v. Gehner*, 281 U. S. 313, 74 L. Ed. 870, 50 S. Ct. 326 (1930); *Saunders v. Shaw*, 244 U. S. 317, 61 L. Ed. 1163, 37 S. Ct. 638 (1917); *Grannis v. Ordean*, 234 U. S. 385, 58 L. Ed. 1363, 34 S. Ct. 779 (1914).

The validity of the following statute of Pennsylvania is involved: The Act of March 9, 1832, P. L. 190 Sections 31-34 and 57. The text of the pertinent provisions of said Act is set forth verbatim in Appendix C.

Questions Presented

1. Does a state statute which provides for the taking of property from one person and transferring it to another without notice or an opportunity to be heard violate the Fourteenth Amendment to the Constitution of the United States?

2. Does a state statute which empowers, enables or permits a Court to authorize and approve a sale of decedent's property without the property being mentioned or described and without the beneficiaries of the estate of the decedent being notified or given an opportunity to be heard deprive the beneficiaries of the estate of property without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States?

3. Are the beneficiaries of a decedent's estate deprived of property without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States when an Orphans' Court of a state authorizes and confirms the sale of the decedent's real estate without notice to the beneficiaries of the estate and without affording them an opportunity to be heard?

4. Where the literal language in a state statute permits the sale of a decedent's real estate only where a full and correct statement of the real estate is filed in Court and when a statement labelled as such a full and correct statement of the real estate is actually filed describing the decedent's real estate as surface only and when after such statement has been served on the owners of the decedent's real estate the Court's decree authorizing the sale is by its terms limited to the real estate described in the statement, if the Supreme Court of the state construes the statute as empowering said Supreme Court fifty years later to inter-

pret said statement and the notice served on the owners and the Court's decree authorizing the sale as including not only surface but also gas because the decedent also owned the gas, does such construction of the statute violate the constitutional rights of the owners of the decedent's real estate granted to them by the Fourteenth Amendment of the Constitution of the United States?

5. When there is a State statute the sole function of which is to confer power upon a Judge to order the sale of a decedent's real estate for payment of debts and it specifically provides that the Court shall not order a sale until a full and correct statement of the decedent's real estate has been exhibited to the Court and further that all the facts necessary to give the Court jurisdiction must be set forth in the Petition, and when a sale of a decedent's real estate took place at a time when the settled construction of said statute by the State Supreme Court was that the Court does not have power to order the sale if all the necessary facts have not been set forth in the Petition, can the Supreme Court of the State fifty (50) years later adopt a construction which in effect construes the statute as if it confers power upon the Court by implication so that by its own acts and its own construction it can create its own power and thereby include thousands of acres of gas which were not set forth in the full and correct statement nor in the notice served on the heirs nor in the Court's decree of sale without violating the Fourteenth Amendment of the United States Constitution?

Statement of the Case

This action was originally instituted in the Court of Common Pleas of Clearfield County, Pennsylvania to determine ownership of the natural gas underlying three tracts

of land consisting of over 3,000 acres situate in Clearfield County. The common source of all claims to the natural gas by all parties was through Norman Theodore Arnold, who acquired the land together with all minerals and gas and oil by a deed dated June 25, 1900 from Isaac F. Richey.

The claims of some of the parties to the proceeding were founded upon certain deeds whereby Arnold, during his lifetime, conveyed certain minerals. The claims of other parties to the proceeding were based upon a deed of the Executors of the Estate of Arnold authorized and made pursuant to certain proceedings in the Orphans' Court of Clearfield County under the Act of 1832, the Act in question. Appellants' claim was that title to the natural gas neither passed by Arnold's deeds during his lifetime nor by his Executors' deed after his death but passed to appellants under his will.

The lower Court held that title to the natural gas was conveyed by the Arnold Executors' deed made pursuant to the Orphans' Court proceedings and that the owners of the natural gas were Cecil B. Highland, Jr., Trustee of the Penfield Coal & Coke Company, an out-of-existence corporation, and E. C. Metzner, Lessee, plaintiffs.

Appellants and other parties appealed to the Supreme Court of Pennsylvania under various theories. Appellants' position was that Arnold's personal representatives and the Orphans' Court were without power to deal with his realty except as such power was granted by his will or by the Orphans' Court in appropriate proceedings and that no such power was granted by his will and the Orphans' Court authorized only the sale of "surface only" of the tracts involved but did not authorize the sale of "natural gas".

The Supreme Court of Pennsylvania stated in the Opinion from which this appeal is taken in 400 Pa. at 281:

> "We are in full agreement with the position taken by the Arnold group (appellants), that, under the terms of Arnold's will, his personal representatives were given no authority to deal with his realty and that, in the absence of any such testamentary authority, Arnold's personal representatives were without any authority to deal with his realty unless and until empowered to do so by a court of appropriate jurisdiction: *Kreise et al. v. Cartledge*, 262 Pa. 55, 104 A. 855; *Morrison's Estate*, 196 Pa. 80, 46 A. 257; *Herron, for use, etc., v. Stevenson et al.*, 259 Pa. 354, 102 A. 1049; *Kelley's Estate*, 297 Pa. 17, 146 A. 260; *Wolfe et al. v. Lewisburg T. & D. Co.*, 305 Pa. 583, 158 A. 567."

The Supreme Court of Pennsylvania concluded however, that Arnold's Executors were authorized to convey the natural gas in question by virtue of a decree of the Orphans' Court of Clearfield County which decree the Orphans' Court was empowered to enter under the Act of 1832, the Act in question. Reversing the lower Court, it held that title to the natural gas, in controversy was in the Commonwealth of Pennsylvania, one of the defendants, which claimed under and through plaintiffs.

The collateral proceeding in the Orphans' Court of Clearfield County occurred over fifty years ago. Arnold died August 4, 1906 in Elk County, Pennsylvania. Letters testamentary were granted in Elk County.

At the time of the 1909 Decree of Sale the settled mode for taking property from heirs and applying it to decedent's debts was fixed by the Act of March 9, 1832, P. L. 190. The Orphans' Court was without power other than conferred by this Act. The sole function of this Act was, to confer power on a judge to sell the real estate and apply the proceeds to the debts of the decedent. The pertinent part of this Act (Section 33) is as follows:

> "That no authority for the sale or mortgage of real estate lying in the same or another county or counties

> shall be granted, until the executor or guardian, as the case may be, shall have exhibited to the said court a true and perfect inventory and conscionable appraisement of all the personal estate whatsoever of the decedent or minor, as the case may be, together with a full and correct statement of all real estate of such decedent or minor wherever situated, which has come to his knowledge * * *"

The settled construction of the Act of 1832 is set forth in *Torrance v. Torrance*, 53 Pa. 505, at 511, as follows:

> "The 57th section of the Act of 29th March 1832 regulating the manner of proceeding in the Orphans' Court in such cases, declares it to be on petition of a person interested setting forth facts *necessary to give the court jurisdiction* (emphasis supplied by the Court) the specific cause of complaint and the relief desired, supported by oath or affirmation. The 19th section of the Act of 16th June 1836, declaring the jurisdiction of the Orphans' Court, directs that such jurisdiction shall be exercised under the limitations and in the manner provided by law."

The appellants in 1909 complied strictly with the Act of 1832 and set forth the full and correct statement called for by the Act, marking their Schedule "C" as follows:

> "A Full and Correct Statement of all the Real Estate of N. T. Arnold, Deceased, Situate in the State of Pennsylvania, Which has Come to the Knowledge of the Executors."

The executors then made full and correct statements concerning their knowledge for the Orphans' Court concerning each item of real estate, whether it be coal, clay, gas, oil, surface only, or lands in fee. Part II of Schedule "C", for instance, particularly mentions gas and oil. The lands here involved are set forth in Paragraphs XXI, XXII, XXIII, and XXIV of Schedule "C" and described as "surface only". Gas is not mentioned.

Following the strict construction of the Act of 1832, the only source of the Court's power, the Orphans' Court in 1909 ordered the sale of "the real estate described in Schedule 'C' attached to said petition and numbered XXI, XXII, XXIII and XXIV at private sale * * *" (80b). Only "surface only" was covered in the full and correct statement filed as to the lands herein involved and as to those lands where it was intended that gas was to be sold, it was so specifically stated. The only notice received by the appellants was that "surface only" in the lands involved was to be sold and the only power in the State courts was to deal with surface only. Notwithstanding this, the Supreme Court of Pennsylvania in a new and revolutionary construction and application of the Act of 1832 transferred the gas in the lands involved from the appellants, stating as follows, (400 Pa. at 281):

> "Even though the descriptions of Parcels 1, 2, 3 and 4 were prefaced as 'surface only', yet Arnold's personal representatives, both in their petition and attached schedule, did represent to the court that they had listed *all* of Arnold's interest in realty in Clearfield County. There can be no doubt, from an examination of the court proceedings which led up to the petition for sale and to the sale itself, that Arnold's personal representatives, in order to liquidate his indebtedness, fully intended to sell *all* of Arnold's interest in realty in Clearfield County of whatever nature and there is no suggestion, expressed or implied, that there was to be a severance of the natural gas rights from the realty."

Thus the Supreme Court using the Act of 1832 as a base unconstitutionally created power in itself which it did not have and took property without due process of law. Gas *was not* described in Paragraphs XXI, XXII, XXIII and XXIV of Schedule "C" and the Orphans' Court in 1909 was not informed of Arnold's ownership of gas. The Orphans' Court, unlike ordinary parties, was not bound to

search the title, nor was it physically possible for said Court to infer ownership of gas in the disputed land from anything before it.

Never before was there any decision holding that an Orphans' Court was empowered to authorize a sale of *all* decedent's real estate under the Act of 1832 by prefacing the description with language out of Section 33 of the Act, "A full and correct statement of all the real estate of * * * which has come to the knowledge of his executors." This interpretation could not have been anticipated by appellants.

Thus it was at this time for the first time that Appellants became apprised of the fact that the Act of 1832, as thus construed, empowers an Orphans' Court to authorize the sale of *all* real estate of a decedent without expressly describing *all* simply by prefacing, heading or labeling a description of part of the real estate with the language of the Act, "A full, correct statement of all the real estate of * * * which has come to the knowledge of his executors." It was not until this new construction of the Act of 1832 was pronounced in the opinion from which this appeal is taken that the federal questions involved herein arose.

A quitclaim deed is mentioned in the Opinion but it has no bearing in this case because the consideration was nominal and the deed was therefore void. A trustee cannot make a gift. With a nominal consideration it self-evidently would ge a gift as far as a *cestui que* trust is concerned. It has never been contended in this case, either by any of the parties or by the Supreme Court, that the consideration was other than nominal ($1.00). Furthermore, the trustee's deed shows on its face that it was made to correct descriptions in the former executor's deed. This deed

therefore has no effect whatever upon the questions here presented.

Within ten days after the Opinion of the Supreme Court of Pennsylvania was filed, appellants filed their Petition for Reargument (a copy of which is appended hereto as Appendix D). This was Appellants' first opportunity to raise the Federal questions.

On page 2 of the Petition for Reargument, Appellants contended:

II.

> "Your Honorable Courts' construction of the Act of March 9, 1832, P. L. 190, renders that statute unconstitutional as in violation of the due process clause (the 14th Amendment, section 1) of the Federal Constitution."

Again at page 6:

> "This construction, we submit, permits the taking away of the natural gas belonging to the Arnold Heirs without said gas ever being considered or thought of, without any possibility of the Court appointing investigators to determine its value and whether it should be sold and without any opportunity for the Court itself to pass on the question of whether all or any part of the gas should be sold to raise the money. The construction clearly permits the taking away of this natural gas without any judicial procedure whatever as to that gas. If the statute means what your Honorable Court has held it to mean then it could just as well have included wholly separate and other tracts of surface or other real estate rights equally unknown to the Executors and to the Court and equally omitted from and not included in the Petition and the Order granted thereon. So construed it is palpably in contravention of the due process clause of the Federal Constitution."

Again at page 7:

> "The fundamental error which, we submit, was made by your Honorable Court was to ignore the fact that a proceeding for the sale of real estate to pay debts under the Act of 1832 effects an involuntary taking away of property from its owners and that, therefore, there is no room in such a proceeding to apply, as your Honorable Court did, (Opinion page 20) rules of construction applicable to the voluntary deed of a grantor himself disposing of his own property.
>
> "Under the Statute as construed by your Honorable Court it would now be possible to find that much valuable real estate of which neither the executors of estates or courts acting on their petitions had knowledge was long ago sold under petitions and orders which made no reference whatever to them and without courts or executors or heirs or other parties in interest having any opportunity to question or contest the propriety of such sales. It is respectfully submitted, therefore, that this constitutional question which did not arise in this case until adjudication by your Honorable Court, requires a reargument of this case to permit a full and complete argument under the Federal Constitution."

Appellants' Petition for Reargument was dismissed without opinion by an Order filed June 27, 1960 (Appendix B).

From this final Order of the Supreme Court of Pennsylvania this appeal has been taken.

The Substantiality of the Federal Questions

This case presents a substantial federal question, because the decision of the Supreme Court of Pennsylvania appealed from holds that under the Act of March 9, 1832, P. L. 190, Sections 31-34 and 57, it is possible for an Orphans' Court of the Commonwealth of Pennsylvania to

authorize and approve a sale of decedent's property over which it has no power or jurisdiction whatever. In this case, the gas was in no way involved before the Orphans' Court and if the Supreme Court's decision is permitted to stand, it is now being taken from the owners thereof without due process of law.

The Supreme Court of Pennsylvania has held that Norman Theodore Arnold was the owner of the natural gas underlying certain tracts of land situate in Clearfield County, Pennsylvania on the date of his death August 4, 1906.

It has also held that when the executors of Arnold sold certain real estate formerly the property of the decedent, their deed and the Court Order upon which it was based, were sufficient to convey title to the natural gas underlying three tracts of land, even though the natural gas was not listed in the executors' petition to the Court, and the Court Order authorized the sale of "surface only". The only notice the beneficiaries had and the only opportunity to be heard was concerning "surface only". They had the right to assume that neither at that time nor later, anything other than surface would be taken from them. A half century after the decree of the Orphans' Court the Supreme Court of Pennsylvania now takes the gas away from the appellants in a clearly unconstitutional assumption of power under the Act of 1832.

This holding was reached by the Supreme Court of Pennsylvania by placing a revolutionary and unanticipated construction upon the Act of 1832, to wit: An Orphans' Court is empowered to authorize an executor to sell *all* real estate of decedent, known or unknown, described or not described, if the executor demonstrates his intention

to sell *all* real estate by prefacing the description of some real estate with the statutory language, "A full and correct statement of all the real estate of * * * which has come to his knowledge."

As soon as the Court pronounced its new construction of the Act, Appellants challenged its validity as being repugnant to the Constitution of the United States by a Petition for Reargument.

That a statute may be constitutional on its face yet unconstitutional as construed, interpreted or applied to a given set of circumstances is well settled. As stated in *Concordia Ins. Co. v. Illinois*, 292 U. S. 535, 545, 78 L. Ed. 1411, 54 S. Ct. 830 (1934):

> "Whether a state statute is valid or invalid under the equal protection clause of the Fourteenth Amendment often depends on how the statute is construed and applied. It may be valid when given a particular application and invalid when given another."

It is equally well settled that where the highest court of the state construes a Statute in such a way as to raise a Federal question which could not have been reasonably anticipated and the Federal question is raised by petition for reargument, an appeal will lie to the Supreme Court of the United States. This rule is conveniently set forth in *Missouri v. Gehner*, 281 U. S. 313, 74 L. Ed. 870, 50 S. Ct. 326 (1930), (Headnote 1-281 U. S. at 313), as follows:

> "1. A judgment of a state supreme court so construing a state statute as to cause it to infringe federal rights is reviewable in this Court even though the federal question was first presented to the state court by a petition for rehearing which was denied without referring to the federal question, if the construction was one that the party affected could not have anticipated and the federal question was presented by him at the first opportunity."

As stated in *Saunders v. Shaw*, 244 U. S. 317, 320, 61 L. Ed. 1163, 37 S. Ct. 638 (1917):

> "But when the act complained of is the act of the Supreme Court, done unexpectedly at the end of the proceeding, when the plaintiff in error no longer had any right to add to the record, it would leave a serious gap in the remedy for infraction of constitutional right if the party aggrieved in such a way could not come here."

Again in *Grannis v. Ordean*, 234 U. S. 385, 58 L. Ed. 1363, 34 S. Ct. 779 (1914), this Honorable Court held that under the circumstances the federal question was timely raised by a petition for reargument, as follows (234 U. S. at 392):

> "There is a motion to dismiss, upon the ground that the Federal question was not properly raised in the state court. The motion must be denied. It is true that until the decision of the Supreme Court of the State, the Federal right was not clearly asserted. But it was not infringed in the trial court, which held in favor of the contention of defendant (now plaintiff in error) that the decree in partition suit was not valid because of the insufficiency of the notice to Geilfuss. It was the decision of the Supreme Court upholding the notice that first ran counter to the alleged Federal rights. In a petition for reargument, filed by the now plaintiff in error, it was suggested that the necessary effect of the decision was to deprive him of his property without due process of law, contrary to the Fourteenth Amendment. The Supreme Court entertained the petition, considered and overruled the contention that petitioner's right under the Amendment were infringed, declared that its decision was to be interpreted as holding against the contention, and therefore refused a reargument. This is sufficient to confer jurisdiction upon this court."

It has always been recognized that notice and hearing are always an indispensable part of due process.

In *Ochoa v. Hernandezy Morales*, 230 U. S. 139, 57 L. Ed. 1427, 33 S. Ct. 1033 (1913), your Honorable Court said at page 161;

> "Without the guaranty of 'due process' the right of private property cannot be said to exist in the sense in which it is known to our laws. The principle, known to the common law before Magna Charta, was embodied in that charter (Coke, 2 Inst. 45, 50) and has been recognized since the Revolution as among the safest foundations of our constitution. Whatever else may be uncertain about the definition of the term 'due process of law' all authorities agree that it inhibits the taking of one man's property and giving it to another, contrary to settled usages and modes of procedure, and without notice or an opportunity for a hearing."

The right to receive notice and be accorded an opportunity for a hearing is fundamental to the requirement of due process of law.

In *Mullane v. Central Hanover Trust Co.*, 339 U. S. 306, 94 L. Ed. 865, 70 S. Ct. 652 (1950), your Honorable Court stated at page 314:

> "An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. *Milliken v. Meyer*, 311 U. S. 457; *Grannis v. Ordean*, 234 U. S. 385; *Priest v. Las Vegas*, 232 U. S. 604; *Roller v. Holly*, 176 U. S. 398. The notice must be of such nature as reasonably to convey the required information, *Grannis v. Ordean, supra*, and it must afford a reasonable time for those interested to make their appearance, *Roller v. Holly, supra*, and c. f. *Goodrich v. Ferris*, 214 U. S. 71. But if with due regard for the practicalities and peculiarities of the case these conditions are reasonably met, the constitutional requirements are satisfied. 'The criterion is not the possibility of conceiv-

able injury but the just and reasonable character of the requirements having reference to the subject with which the statute deals.' *American Land Co. v. Zeiss*, 219 U. S. 47, 67; and see *Blinn v. Nelson*, 222 U. S. 1, 7.

"When notice is a person's due, process which is a mere gesture is not due process. The means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it. The reasonableness and hence the constitutional validity of any chosen method may be defended on the ground that it is in itself reasonably certain to inform those affected, compare *Hess v. Pawloski*, 274 U. S. 352 with *Wuchter v. Pizzutti*, 276 U. S. 13, or, where conditions do not reasonably permit such notice, that the form chosen is not substantially less likely to bring home notice than other of the feasible and customary substitutes."

The rule of the Mullane case was reaffirmed in *Walker v. Hutchinson City*, 352 U. S. 112, 1 L. E. 2d 178, 77 S. Ct. 200 (1956) where your Honorable Court said in referring to the *Mullane* case as follows:

"That case establishes the rule that, if feasible, notice must be reasonably calculated to inform parties of proceedings which may directly and adversely affect their legally protected interests." P. 115.

In *American Land Company v. Zeiss*, 219 U. S. 47, 55 L. Ed. 82, 31 S. Ct. 200 (1911) the Court said quoting from *Twining v. New Jersey*, 211 U. S. 78:

"Due process requires that the court which assumes to determine the rights of parties shall have jurisdiction (citing cases) and that there shall be notice and opportunity for hearing given the parties, (citing cases). Subject to these two fundamental conditions, which seem to be universally prescribed in all systems of law established by civilized countries, this court has, up to this time, sustained all state laws, statutory or judicially declared, regulating procedure, evidence and methods of trial, and held them to be consistent with due process of law."

The above quotations of law serve to emphasize the substantiality of the federal questions presented by Appellants. While many of the cases before the Supreme Court involve consideration of the *sufficiency* of the notice provided for in state statutes, an extreme case is presented where, as in the present case, under the interpretation of the statute by the Supreme Court of Pennsylvania there is no necessity whatever for notice or hearing.

Under the statute of Pennsylvania, as construed and applied by the Supreme Court of Pennsylvania, the owners of the natural gas underlying over 3,000 acres of land were divested of their title to such gas by an unconstitutional assumption of power on the part of the Supreme Court and without notice to appellants or without any hearing being accorded to them. Under the interpretation placed upon the statute by the Supreme Court of Pennsylvania, these heirs have been and the heirs of many other estates may be deprived of property not actually included in executors' petitions for sale of real estate nor included in Court orders for the sale of real estate, simply by judicial arrogation of power by implication.

Conclusion

This appeal brings before this Court substantial federal questions both in terms of the far-reaching legal questions involved and in the practical effect on rights of beneficiaries of decedents' estates and on titles to natural gas in Pennsylvania. The questions presented are so substantial as to require plenary consideration with briefs on the merits and oral argument, for their resolution.

Respectfully submitted,

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APPENDIX "A"

[287]

IN THE

SUPREME COURT OF PENNSYLVANIA

EASTERN DISTRICT

CECIL B. HIGHLAND, JR., Trustee of the Penfield Coal & Coke Company, an out-of-existence corporation, and E. C. METZNER, Lessee,

v.

COMMONWEALTH OF PENNSYLVANIA, NEW SHAWMUT MINING COMPANY, SEBASTIAN C. PUGLIESE and GRACE PUGLIESE, A. J. PALUMBO and SIGISMUNDA PALUMBO, RIDGEWAY NATIONAL BANK, BRUCE ISAACSON, and JOHN BELL, SUCCESSOR TRUSTEES UNDER THE WILL OF N. T. ARNOLD, DEVONIAN GAS AND OIL COMPANY, and NEW YORK STATE NATURAL GAS COMPANY,

Appellants.

Nos. 246, 247, 249, 250, 252, 257 and 284
January Term, 1959.

Appeals from the Decree of the Court of Common Pleas of Clearfield County, No. 366 November Term, 1957.
Entered April 27, 1959.

OPINION

JONES, B. R., *J.*

The basic issue presented by these seven appeals concerns the ownership of the right to the natural gas under-

lying four parcels—approximately 3784 acres—of land situated in Huston Township, Clearfield County. The determination of this issue rests largely upon the construction and interpretation of the provisions of seven deeds and an examination of several judicial proceedings which resulted in the execution of two of these deeds.

On June 25, 1900, I. F. Richey *et al.*, trustees of the Caledonia Coal Company, conveyed, *inter alia*, to one N. F. Arnold these four parcels of land—herein known as Parcels 1, 2, 3 and 4—[287-2] said parcels being described as "tracts", "parcels" or "pieces" of land. *In addition to these four parcels of land*, this deed (herein termed the *Richey* deed) purported to convey: (1) "All the coal, coal oil, fire clay and other minerals of every kind and character in, upon and under" 15 described tracts of land; (2) "All the coal, coal oil, fire clay and other minerals of whatever nature or character" under 8 described tracts of land; (3) several other tracts of land. At the end of the descriptive portions of this deed the following appeared: "It is the intention of [Richey *et al.*] to convey * * * all the land, coal, coal oil, fire clay, *natural gas*, and other minerals and all rights vested in [Richey *et al.*] [under a certain prior deed] * * * Together with the right and privilege of entering upon such lands as are not conveyed * * * and taking away said coal, coal oil, *natural gas*, fire clay and other minerals of every kind and character * * * and to do * * * such * * * things thereon in such manner as may be necessary in the judgment of [Arnold] to successfully mine and take away said coal, coal oil, *natural gas*, fire

* "The ownership of gas rights under Parcel No. 3 has been withdrawn from consideration on this appeal and, therefore, the adjudication herein rendered does not determine the ownership of the gas rights under Parcel No. 3".

clay and other minerals, * * *". (Emphasis supplied.) It is conceded by all parties to this litigation that, by the *Richey* deed—the common source of title of all the present litigants—, title to all the natural gas rights under these four parcels of land became vested in Arnold.

On the same date as the *Richey* deed, Arnold and his wife made a conveyance to John Byrne, trustee for one Frank Byrne and one Frank Smith, the said John Byrne being empowered to explore for "coal and other minerals" and "to mine, take and carry away the same", "to sell or lease the said lands and mineral rights, to pay the taxes and protect the "lands and minerals" and to mortgage the "lands, [287-3] coal and minerals" to secure [Arnold] the purchase money or develop the property. Under the provisions of this deed (herein termed the *Byrne* deed) Arnold and his wife conveyed: "All the coal, fire clay, limestone, iron ore and other minerals" in and under certain land in Huston Township, Clearfield County, said land being described by metes and bounds. In the *Byrne* deed between the descriptive and *habendum* clauses appeared the following: "TOGETHER with all and singular the ways, water, water courses, mining rights, minerals, rights of way, rights, liberties, privileges, and appurtenances whatsoever thereunto belonging or in any way appertaining and the reversions, remainders, rents, issues and profits thereof, and all the estate, right, title, interest, property, claim and demand of [Arnold] * * * in law, equity or otherwise howsoever, of and to the same and every part thereof, with the right and privilege of entering upon said land and taking away said *coal, fire clay, iron-ore, lime-stone and other minerals* hereby conveyed and to erect such structures,

ways, buildings, railways and shafts thereon both up and down, to cut and fill the surface wherever needed for railways for such purposes, and to dig ditches and channels for waste water and to do those and such other things thereon in such manner as may be necessary in the Judgment of [John Byrne] and to carefully mine and take away such *coal, fire clay, lime stone, iron ore and other minerals* or any of them from the lands aforesaid." (Emphasis supplied.) In this deed Parcels 1 and 4 constitute the overlying land.

On July 30, 1900, Arnold and his wife conveyed by deed (herein termed the *Hall-Kaul deed*) to one J. K. P. Hall and one Andrew Kaul "all the coal, iron ore, lime stone, fire clay and other minerals" under a certain tract of land, "All the Coal, Coal Oil, and other [287-4] minerals of every kind and character" under another tract of land; "All the Coal, Coal Oil and all other minerals of every kind and character" under several other tracts of land; "All the coal, fire clay, iron-ore and other minerals" under another separate tract of land and "All the coal, and minerals" under still another separate tract of land. Following the descriptive clauses in this deed appeared the following: "TOGETHER with right and privilege of entering upon said lands and taking away said *coal, coal oil, fireclay and other minerals of every kind and character*, and to erect such structures, ways, buildings, tramways and shafts thereon both up and down, to cut and fill the surface wherever needed for railways for such purposes; and to dig ditches and channels for waste water, and to do those and such other things thereon in such manner as may be necessary in the Judgment of [Hall-Kaul], to successful-

ly mine and take away said *coal, iron ore, fire clay and other minerals or any of them* from the lands aforesaid." (Emphasis supplied.) This deed includes the overlying land known as Parcels 2 and 3.

All the rights conveyed in the *Byrne* and *Hall-Kaul* deeds have now, by subsequent conveyances, become vested in the present appellants known as the New Shawmut group,[1] a group which now claims all the natural gas rights under the four parcels of land.

Arnold died August 4, 1906, a resident of Elk County. Under his will—dated February 4, 1901—he gave his entire estate to certain trustees to hold, initially, for the benefit of his wife and three children and, ultimately, of the Methodist Episcopal Church. Under this will Arnold gave no authority to his executors to deal [287-5] with his realty and instructed his trustees, *inter alia*: "Neither shall any property be sold or leased for the production of coal, oil, gas or minerals without the written consent and approval of each and every Trustee, of whom there shall be not less than three capable of transacting business at all times".[2]

At the time of his death Arnold was heavily indebted. At the instance of creditors, the Orphans' Court of Elk County on February 10, 1909 directed his executors to seek court permission for the sale of Arnold's realty for the payment of debts. On February 26, 1909, the executors petitioned that court for permission to sell, at private sale,

[1] This group is composed of New Shawmut Mining Company, S. C. Pugliese, *et ux.*, A. J. Palumbo, *et ux.*, and Devonian Gas and Oil Company.

[2] The will also provided: "Royalties from mines or other sources, including oil and gas wells, whether now being worked or opened or opened under a contract with my Trustees, shall be treated as income and not as real estate".

all Arnold's realty in Elk County for $48,000 for the payment of his debts and for authority to raise $152,000 from Arnold's realty situated in Clearfield County (as described in Schedule "C" attached to the petition) "for the purpose of paying the balance of the debts which are liens against the real estate of [Arnold]". In Schedule "C" were metes and bounds descriptions prefaced: "Surface only". On that same date the Orphans' Court of Elk County authorized the sale of Arnold's Elk County property for $48,000 and authorized the executors to raise $152,000 from Arnold's Clearfield County realty. On March 8, 1909 the executors asked the Orphans' Court of Clearfield County for permission "To sell all of said land situate in [Clearfield County] described in Schedule 'C' " for $152,000 and that court granted such permission. On May 27, 1909 the executors reported to that court the sale at private sale of all Arnold's real estate in Clearfield County for $152,000 to one B. F. Thompson and that court confirmed the sale. [287-6] On May 31, 1909 Arnold's executors made a conveyance to B. F. Thompson. By its provisions, this deed (herein termed the *Arnold Executors'* deed) conveyed, *inter alia*, to Thompson the "Surface only" of certain tracts of land in Clearfield County described by "metes and bounds", descriptions inclusive of Parcels 1, 2, 3, and 4. This deed conveyed items of realty numbered I-IX, inclusive, and the following prefatory language appeared before "metes and bounds" descriptions of several of the items: Item I, "All the coal, coal oil, fire clay, and other minerals of every kind and character in, upon and under the following described tracts of land"; Item II, "All the minerals, coal, fire clay, iron ore, oil, gas and other kinds whatsoever * * * in, upon and under" certain described land; Item

III, "The undivided 2/5ths interest in all the coal, coal oil, fire clay and other minerals of every kind and character in, upon and under" certain described tracts of land. Items VI, VII, VIII and IX, which included Parcels 1, 2, 3 and 4, were prefaced "Surface only". Between the descriptive and *habendum* clauses appeared: "Together with the right and privilege of entering upon such lands as are *not* conveyed and being described herein and taking away said coal, coal oil, *natural gas*, fire clay and other minerals of every kind and character, and to erect such structures, ways, buildings, railways, and shafts thereon both up and down, to cut and fill the surface wherever needed for railways for such purpose and to dig ditches and channels for waste water, and to do these and such other things thereon in such manner as may be necessary in the judgment of [Thompson], to successfully mine and take away said coal, coal oil, *natural gas*, fire clay and other minerals, or any part of them from the lands aforesaid without liability for damages which may be incurred to the surface of the said lands, or anything thereon or [287-7] thereunder; and with the right to use such timber as was reserved to [Arnold] or in him in anyway vested; so fully as the same were granted and conveyed to [Arnold], and so far as [Arnold] was seized at the time of his death." (Emphasis supplied.) The Arnold group of claimants[3] contend that the *Arnold Executors'* deed did not convey any of the natural gas rights under Parcels 1, 2, 3 and 4.

On February 23, 1910, Thompson and his wife conveyed to Penfield Coal & Coke Company, (herein called Penfield)

[3] Included in the Arnold group are Ridgeway National Bank, Bruce Isaacson and John Bell, successor trustees under Arnold's will, the New Shawmut Mining Company (by virtue of a deed from Arnold's trustees to said company on *April 4, 1958*) and New York State Natural Gas Company, the latter the purchaser of the gas being produced by Devonian Gas and Oil Company.

interests in certain realty, Items IV, V, VI and VII of which conveyance are presently relevant. This deed (herein termed the *Thompson-Penfield* deed) conveyed: "All of the surface of all that certain tract of land in Huston Township, Clearfield County * * *" of Items IV to VII, inclusive,—covering Parcels 1, 2, 3 and 4—and the pertinent descriptions in that deed correspond exactly with the pertinent descriptions in the *Arnold Executors'* deed. In this deed between the descriptive and the *habendum* clauses appears: "TOGETHER with the right and privilege of entering upon the lands hereinabove described and taking away said coal, coal oil, *natural gas*, fire clay and other minerals of every kind and character, and to erect such structures, ways, buildings, railways and shafts thereon, both up and down, to cut and fill the surface wherever needed for railways for such purpose, and to dig ditches and channels for waste water, and to do these and such other things thereon in such manner as may be necessary in the judgment of the said party of the second part, its successors and assigns, to successfully mine and take away said coal, coal oil, *natural gas*, fire clay and other minerals or any part of [287-8] them, from the lands aforesaid, without liability for damages which may be incurred to the surface of the said lands or anything thereon or thereunder; and with the right to use such timber as was reserved to [Arnold] or in him in any way vested as fully as the same were granted and conveyed to [Arnold], and so far as [Arnold] was seized at the time of his death." (Emphasis supplied.)

On April 14, 1911, Arnold's trustees gave a quitclaim deed to Penfield which recited, *inter alia*: "AND WHERE-

Appendix "A".

AS owing to certain alleged informalities in the descriptions of the lands hereinafter set forth, it is the desire of the Estate of the said N. T. Arnold to cure any and all defects or alleged defects in the Deed from the said Executors to the said B. F. Thompson above mentioned so as to vest all the estate of the said N. T. Arnold in said lands in the party of the second part hereto." This deed (herein termed the *Penfield Quitclaim* deed) purported to "release and quitclaim to [Penfield] all the interest of [Arnold] in those certain pieces, parcels and tracts of land situate in [Huston Township, Clearfield County]" and contained four descriptions by "metes and bounds" of Parcels 1, 2, 3 and 4. A comparison of the *Arnold Executors'* and the *Thompson-Penfield* deeds with the *Penfield Quitclaim* deed reveals certain variations. The latter deed contains a description of four tracts of land which are Items IV, V, VI and VII of the *Thompson-Penfield* deed and Items VI, VII, VIII and IX of the *Arnold Executors'* deed. The "metes and bounds" description of the first two tracts of land in the *Penfield Quitclaim* deed substantially differ from the description in the *Arnold Executors'* deed and the *Thompson-Penfield* deeds; the description of the last two tracts of land in the former deed vary from the latter deeds in that in the *Penfield-Quitclaim* deed the recital clauses of the descriptions contained in the *Arnold Executors'* and *Thompson-Penfield* deeds are omitted; lastly, the prefactory clauses in the *Arnold Executors'* and the *Thompson-Quitclaim* [287-9] deeds limiting the terms of the conveyance of all four tracts of land to "surface only" are omitted from the descriptions in the *Penfield Quitclaim* deed.

Appendix "A".

In 1926 the U. S. District Court for the Western District of Pennsylvania appointed one L. W. Smith as receiver for Penfield which was in serious financial difficulties.[4] Being unable to operate Penfield successfully because of the lack of working capital and the poor quality of its coal, Smith petitioned the U. S. Court for permission to sell at public auction 3784.35 acres (the land in controversy) of "wild surface land in fee but without mineral rights". In the receiver's petition it was averred, *inter alia*: (1) "The Receiver can see no prospects for any sale of these holdings in the future as coal properties, though possibly recent gas and oil developments in the northern central part [of Pennsylvania] may make some market, though the lands belonging to [Penfield] have never been tested for oil or gas"; (2) "among the real estate owned by [Penfield] there are about 3784.35 acres of wild surface land without mineral rights which [Penfield] owns in fee * * *"; (3) that the Commonwealth of Pennsylvania, Department of Forests and Waters "is desirous of acquiring the said surface land and has offered to pay therefor the sum of $2.90 per acre or a total of $10,974.61". The U. S. Court directed the property be advertised for sale, the sale was held and was later confirmed by that court. On July 22, 1931, Smith, as receiver, by a deed (herein called *Commonwealth* deed) conveyed Parcels 1, 2, 3 and 4 to the Commonwealth, and the Commonwealth has for over 28 years been in possession of said parcels.

[4] On March 1, 1910 Penfield had entered into a mortgage to secure an issue of bonds with the Guarantee Title & Trust Co. of Pittsburgh. At the time of the receivership there were outstanding bonds of a par value of $518,000 and unpaid interest from September 1, 1923.

Appendix "A".

It is Penfield's contention that, by virtue of the *Arnold Executors'* deed, the *Thompson-Penfield* deed and the *Penfield Quitclaim* [287-10] deed, it became vested with all Arnold's rights to the natural gas under the instant land and that, by the *Commonwealth* deed, it conveyed to the Commonwealth only the surface and not the gas rights thereunder. On the other hand, the Commonwealth contends that not only did Penfield receive Arnold's natural gas rights under the instant land, but that, by the *Commonwealth* deed, Penfield conveyed all such natural gas rights to the Commonwealth.

On December 31, 1957—26 years subsequent to the *Commonwealth* deed—Cecil B. Highland, Jr., appointed by the Court of Common Pleas of Clearfield County as trustee for Penfield for the purpose, *inter alia*, of ascertaining the amount of land, minerals, gas and oil rights, if any, still owned by Penfield, and E. C. Metzner to whom Highland, with the court's permission, had granted an oil and gas lease, instituted in the Court of Common Pleas of Clearfield County an action to quiet title. This action was originally instituted only against the Commonwealth of Pennsylvania; on the instance of the Commonwealth, all of the present appellants, with the exception of the New York State Natural Gas Company which intervened, were joined as defendants in this action. The court of Common Pleas of Clearfield County found that Highland, trustee, and Metzner, *i.e.* the Penfield claimants, had title to all the natural gas rights under the land in controversy. Exceptions taken to this decree *nisi* were dismissed and a final decree entered from which these seven appeals were taken.

Appendix "A"

In summary, there are four separate groups which claim title to the natural gas rights under Parcels 1, 2, 3 and 4: (1) the Shawmut group which claims such title by virtue of the *Byrne* and *Hall-Kaul* deeds; (2) the Arnold group which takes the position that neither Arnold, by the *Byrne* or *Hall-Kaul* deeds, nor his executors, by the *Arnold Executors'* deed, nor his trustees, by the *Penfield Quitclaim* [287-11] deed, relinquished Arnold's title to the natural gas rights and that such title still remains in the Arnold group; (3) the Penfield group which rests its title on the *Arnold Executors'*, the *Thompson-Penfield* and *Penfield Quitclaim* deeds and denies any divestiture of such title by the *Commonwealth* deed; (4) the Commonwealth of Pennsylvania which claims title by virtue of the *Commonwealth* deed.

Since, as hereinbefore stated, all parties concede that Arnold, by virtue of the *Richey* deed, received full title to *all* the natural gas rights, our initial inquiry is whether Arnold's title, either before or after his death, was conveyed to any third person or persons.

THE BYRNE AND HALL KAUL DEEDS

Upon these two deeds the Shawmut group rests its claim and contends that the parties in both deeds—Arnold and wife, grantors, and Byrne, Hall and Kaul, grantees—fully intended to effect thereby a conveyance of the natural gas rights by the use of the words "other minerals" in both deeds, such intent being shown by the language of both deeds, the surrounding circumstances and by events which occurred subsequent thereto, *i.e.* subsequent conveyances by Arnold's executors and trustees.

Appendix "A".

Eighty seven years ago a *general* definition of the word "minerals" was approved by this Court: "The term 'minerals' embraces everything not of the mere surface, which is used for agricultural purposes; the granite of the mountain as well as metallic ores and fossils, are comprehended within it": *Griffin v. Fellows, et al.*, 81½ Pa. 114, 124. Thirty three years later in *Silver v. Bush*, 213 Pa. 195, 197, 62 A. 832, we said: "This court has had frequent occasion to [287-12] consider the word mineral, and to define its meaning in different connections. A number of cases are cited by appellant in which it has been decided that petroleum and natural gas are minerals. Of the fact that under the broad division of all matter into the three classes of animal, vegetable and mineral, petroleum and gas are minerals, there has never been any room for question, and even under some more restricted classifications the same result may be reached. But, on the other hand, it has also been held that in other connections they are not included under that term. There is no discrepancy in the cases. The variations in the scope of the word arise from the connection and application in which it is used. The crucial question * * * is what was the sense in which the parties used the word. Mineral is not *per se* a term of art or of trade, but of general language, and presumably is intended in the ordinary popular sense which it bears among English speaking people. It may in any particular case have a different meaning, more extensive or more restricted, but such different meaning should clearly appear as intended by the parties. * * * In the present case the question arises in respect to natural gas, the plaintiff claiming that it was included in

the reservation of the 'minerals underlying' the land conveyed. Certainly such gas is a mineral in the broadest sense of the term, but no evidence was given or offered to show that the parties so understood or intended the word mineral, or even that it had acquired a usage in conveyancing which would include gas".

In *Dunham & Shortt v. Kirkpatrick*, 101 Pa. 36 (decided in 1882) this Court enunciated a rule of construction of the word "minerals" to be applied when determining the inclusion therein or the exclusion therefrom of natural gas or oil. This decision established a rule of property which was a recognized part of the law of this state when the *Byrne* and *Hall-Kaul* deeds were executed and is a rule upon [287-13] which the validity of many titles has long since rested. The *Dunham* rule—the existence of which is conceded by the Shawmut group—is based upon the popular conception of the meaning of the word "minerals". The rule may be briefly stated: if, in connection with a conveyance of land, there is a reservation or an exception of "minerals" without any specific mention of natural gas or oil, a presumption, rebuttable in nature, arises that the word "minerals" was not intended by the parties to include natural gas or oil: *Dunham & Shortt v. Kirkpatrick, supra; Silver v. Bush, supra; Preston, et al. v. South Penn Oil Company, et al.*, 238 Pa. 301, 86 A. 203; *Bundy v. Myers*, 372 Pa. 583, 94 A. 2d 724. In *Preston, supra*, (p. 304) Chief Justice Fell stated: "Dunham v. Kirkpatrick has been the law of this State for thirty years and very many titles to land rest upon it. It has become a rule of property and it will not be disturbed." Seven years ago in *Bundy, supra*, our present

Chief Justice stated, (p. 587): "Dunham v. Kirkpatrick has now been the law of this State for seventy years and is still no less a rule of property which is not to be disturbed". As a rule of property long recognized and relied upon, the *Dunham* rule binds and controls this situation:[*] that the word "minerals" appears in a grant, rather than an exception of a reservation, in nowise alters the rule. To rebut the presumption established in *Dunham, supra*, that natural gas or oil is not included within the word "minerals" there must be clear and convincing evidence that the parties to the conveyance intended to include natural gas or oil within such word.

[287-14] Shawmut argues that there is clear and convincing evidence of record that the parties in both the *Byrne* and *Hall-Kaul* deeds did intend to include natural gas within the term "minerals" and that the presumption has been rebutted. Shawmut's argument rests upon several premises: (1) the "statement of intention" clause in the *Richey* deed indicates that Richey *et al.*, the grantors, and Arnold, the grantee, dealt with and recognized natural gas as a "mineral"; (2) inasmuch as the *Byrne* deed was made the same date and the *Hall-Kaul* deed a month later, it is to be presumed, in the absence of evidence to the contrary, that Arnold in the *Byrne* and *Hall-Kaul* deeds placed the same meaning on "minerals" therein as given that same word in the *Richey* deed, *i.e.* "minerals" should be given the same meaning in the deeds *from* Arnold as in the deed *to* him;

[*] "A rule of property long acquiesced in should not be overthrown except for compelling reasons of public policy or the imperative demands of justice": *Smith v. Glen Alden Coal Co., et al.*, 347 Pa. 603, 616, 39 A. 2d 909. See also: *Madden et al. v. Gosztonyi S. & T. Co.*, 331 Pa. 476, 491, 200 A. 264; *Davis v. Pennsylvania Co., etc.*, 337 Pa. 456, 464, 12 A. 2d 66; *Commonwealth v. Wucherer*, 351 Pa. 305, 308, 41 A. 2d 574; *Burtt Will*, 353 Pa. 217, 231, 44 A. 2d 670; *Borsch Estate*, 362 Pa. 581, 589, 67 A. 2d 119; *Malamed v. Sedelsky*, 367 Pa. 353, 359, 80 A. 2d 853.

(3) that the absence in the subsequent deeds *from* Arnold, his personal representatives or trustees to Thompson, *et al.*, of any specific reference to natural gas and the reference in such deeds to surface indicates that the parties acted upon the understanding that the *Byrne* and *Hall-Kaul* deeds had already divested Arnold of any ownership in the natural gas.

The opponents of the Shawmut claim: (1) the exclusion of the words "natural gas" in the *Byrne* and *Hall-Kaul* deeds from the detailed enumeration of the minerals therein conveyed, as contrasted with the specific inclusion of "natural gas" in the *Richey* deed, indicates an intent to exclude "natural gas" from the word "minerals"; (2) an examination of the *Byrne* and *Hall-Kaul* deeds reveals that the parties thereto were concerned not with natural gas but with coal; (3) the "rights-of-way" granted in the *Byrne* and *Hall-Kaul* deeds failed to mention such "rights-of-way" as were necessary for the extraction of natural gas; (4) by application of the rule of *ejusdem generis* it is evident that the parties intended by the use of the [287-15] word "minerals" to convey only *hard* minerals of the same type and character as those which were enumerated; (5) presumptively the word "minerals" does not include natural gas and such presumption must control.

Starting out with the presumption that the word "minerals" does not include natural gas, is there of record any evidence, clear and convincing in quality, that the parties in the *Byrne* and *Hall-Kaul* deeds intended to include natural gas within the words "other minerals"? The mining of coal, not the recovery of natural gas, was the principal objective of the *Byrne* and *Hall-Kaul* conveyances; in fact,

John Byrne's principal duties as trustee were in connection with the recovery of coal. Even in 1926—over a quarter of a century subsequent to these two deeds—this property had never been tested for natural gas or oil.* The *Richey* deed and the *Byrne* deed were executed almost simultaneously; in the former deed the title to the natural gas was *expressly* conveyed while in the latter deed natural gas is not even mentioned. It is inconceivable that, if Arnold has intended to convey the title to the natural gas to Byrne and Hall-Kaul which he had received in the *Richey* deed, he would not have described the *Byrne* and *Hall-Kaul* conveyances in language similar to or identical with the language in the *Richey* deed. Of great significance in the interpretation of the parties' intent is the fact that the *Richey* deed expressly conveys natural gas rights yet the *Byrne* and *Hall-Kaul* deeds make no reference to such rights. Four minerals—coal, fire clay, limestone and iron ore—are specifically mentioned in the *Byrne* deed; two minerals—coal and coal oil—are specifically mentioned in the *Hall-Kaul* deed; a study of the language in both deeds indicates a high [287-16] degree of selectivity and precision of language and description to have been employed by Arnold, especially bearing in mind that he had but recently been *expressly* given the rights to the natural gas. Arnold's omission of natural gas, coupled with the variation in the delineation of the minerals expressly conveyed to Byrne and Hall-Kaul, indicates that Arnold did *not* intend to convey *all* the mineral rights he had received from Richey *et al.* Furthermore, application of the rule of *ejusdem generis* clearly indicates that the words "other minerals" was intended to

*Cf: Petition of Penfield Receiver to the United States District Court in 1926.

include only minerals of the character or the type enumerated with particularity and natural gas is certainly not of such character or type.

The burden was upon the Shawmut group to show, by clear and convincing evidence, that the parties intended that natural gas be included within the term "other minerals". Neither the language of the deeds, the surrounding circumstances nor the subsequent conveyances made by Arnold and his successors in title demonstrate such intent. Any implications which are to be gathered from the language of subsequent conveyances by Arnold and his successors in title as to what was intended in the *Byrne* and *Hall-Kaul* deeds are wholly negative and lacking entirely in the character of evidence envisioned by our courts as necessary to overthrow the well-established presumption. In the absence of any such evidence, the long recognized rule of property which presumes that natural gas is not a "mineral", whether the word "mineral" appears in a reservation, an exception or a grant, must control. The *Byrne* and *Hall-Kaul* deeds did not convey title to natural gas rights and the New Shawmut group, successors in title to Byrne and Hall-Kaul, has no title whatsoever to such rights.

[287-17] ARNOLD GROUP CLAIM

The Arnold group, taking the position that neither Arnold nor his personal representatives nor his trustees ever parted with the rights to the natural gas vested in Arnold by the *Richey* deed, argue: (1) that the *Byrne* and *Hall-Kaul* deeds conveyed no rights to natural gas; (2) that, under the law in 1909, Arnold's personal representatives

were without any power to deal with his realty except as such power was granted by Arnold's will or by the Orphan's Court; (3) that Arnold's will granted to his personal representatives no such power, that the Orphan's Court did not authorize the sale of the natural gas rights and that Arnold's personal representatives had no authority to effect a sale of such rights; (4) that the *Penfield Quitclaim* deed simply corrected the description of the surface in the 1909 deed [Arnold Executors' deed] and did not effect a conveyance of the rights to the natural gas.

We have already expressed our opinion that the *Byrne* and *Hall-Kaul* deeds did not convey the natural gas rights so that if there was any conveyance of such rights it took place subsequent to Arnold's death.

We are in full agreement with the position taken by the Arnold group that, under the terms of Arnold's will, his personal representatives were given no authority to deal with his realty and that, in the absence of any such testamentary authority, Arnold's personal representatives were without any authority to deal with his realty unless and until empowered to do so by a court of appropriate jurisdiction: *Kreise et al. v. Cartledge*, 262 Pa. 55, 104 A. 855; *Morrison's Estate*, 196 Pa. 80, 46 A. 257; *Herron, for use, etc. v. Stevenson et al.*, 259 Pa. 354, 102 A. 1049; *Kelley's Estate*, 297 Pa. [287-18] 17, 146 A. 260; *Wolfe et al. v. Lewisburg T. & S. D. Co.*, 305 Pa. 583, 158 A. 567.

However, in the event that a decedent's debts could not be satisfied out of his personalty, then his realty could be utilized for such purpose by his personal representatives provided that compliance was had with certain statutory

requirements: Section 20, Act of Feb. 24, 1834, P. L. 70.[1] Under that statute if the personalty of a decedent was insufficient to pay his just debts, it became the personal representative's duty to sell or mortgage, under the direction to the Orphans' Court, so much of the realty as was necessary to pay such debts. The procedure was prescribed in the Act of March 29, 1832, P. L. 190, § 32, § 33, and the Act of May 9, 1889, P. L. 182, § 1, the latter permitting the Orphans' Court to direct a private sale, with the Arnold group's contention that the *Arnold Executor's* deed was dependent for its validity upon the terms of the order of the Orphans' Court and that the sale which such order effected was a judicial sale, subject to strict construction, we are in full accord.

Applying these principles to the instant factual situation, we find that, in accordance with § 33 of the Act of 1832, *supra*, Arnold's executors exhibited to the court a "full and correct statement" of all Arnold's realty.

A reference to Schedule "C", [attached to the executor's petition for the sale] indicates that it was prefaced as a "full, correct statement of all the real estate of [Arnold] * * * which has come to the knowledge of his executors". The Arnold group now argues that the rights to the natural gas were never listed by Arnold's personal representatives in the petition for sale, that no [287-19] authority to sell such rights was requested and that no such authority was granted by the court.

Even though the descriptions of Parcels 1, 2, 3 and 4 were prefaced as "surface only", yet Arnold's personal representatives, both in their petition and attached sched-

[1] See also: Act of April 19, 1794, § 21.

ule, did represent to the court that they had listed *all* of Arnold's interest in realty in Clearfield County. There can be no doubt, from an examination of the court proceedings which led up to the petition for sale and to the sale itself, that Arnold's personal representatives, in order to liquidate his indebtedness, fully intended to sell *all* of Arnold's interest in realty in Clearfield County of whatever nature and there is no suggestion, expressed or implied, that there was to be a severance of the natural gas rights from the realty.

In *Arnold's Executors'* deed, after a description of the various properties, the following appeared: "Together with the right and privilege of entering upon such lands as are not conveyed and being described herein and taking away said coal, coal oil, *natural gas*, fire clay and other minerals of very kind and character, and to erect such structures, ways, buildings, railways, and shafts thereon both up and down, to cut and fill the surface wherever needed for railways for such purposes and to dig ditches and channels for waste water, to do these and such other things thereon in such a manner as may be necessary in the judgment of [Thompson], to successfully mine and take away said coal, coal oil, natural gas, fire clay and other minerals, or any part of them from the lands aforesaid without liability for damages which may be incurred to the surface of the said lands, or anything thereon or thereunder; and with the right to use such timber as was reserved to [Arnold] or in him in anyway vested; *so fully as the same were granted and conveyed to* [287-20] [Arnold]; and so far as [Arnold] was seized at the time of his death." (Emphasis supplied.)

Appendix "A".

In *Brookbank v. Benedum-Trees Oil Company*, 389 Pa. 151, 157, 131 A. 2d 103, we set forth certain rules applicable in the construction of deeds. As we said in *Tuscarage v. Hamlin*, 391 Pa. 13, 16, 137 A. 2d 242: "Among such rules are those providing: (1) that the nature and quantity of the interest conveyed must be ascertained from the instrument itself and cannot be orally shown in the absence of fraud, accident or mistake and we seek to ascertain not what the parties may have intended by the language but what is the meaning of the words; (2) effect must be given to *all* the language of the instrument and no part shall be rejected if it can be given meaning; (3) the language of the deed shall be interpreted in the light of the subject matter, the apparent object or purpose of the parties and the conditions existing when it was executed." By an application of these rules to the construction and interpretation of *Arnold Executors'* deed, considering fully the executors' petition to the Orphans' Court and the order of that Court, it is crystal clear that both Arnold's personal representatives and the court which directed the sale contemplated that *all* Arnold's interest in realty located in Clearfield County was to be conveyed and that no severance of the natural gas rights was intended. The petition to the court, the court order and *Arnold Executors'* deed all contemplated a conveyance of *all* the rights and interests, including natural gas but excluding that which was conveyed in the grants to Byrne and Hall-Kaul, which Arnold had acquired through the *Richey* deed. Even the strict construction applicable to judicial proceedings dictates the same result.

The *Arnold Executors'* deed effectively conveyed to Thompson all the rights which Arnold had acquired under

the *Richey* deed, with [287-21] the exception of such rights as were conveyed by the *Byrne* and *Hall-Kaul* deeds. Thompson, in turn, conveyed all his rights under the *Arnold Executors'* deed to Penfield by the *Thompson-Penfield* deed. While the expressed purpose of the *Penfield Quitclaim* deed was to correct certain portions of the *Arnold Executors'* deed, a scrutiny of that deed clearly reveals that it was understood by and intended by Arnold's trustees that Penfield acquire *all* Arnold's interest in and under the land in question. Penfield, by these successive conveyances, acquired title to all the natural gas rights which Arnold had once owned and the Arnold group has presently no rights whatsoever to the natural gas under Parcels 1, 2, 3 and 4.

THE PENFIELD GROUP CLAIM

The court below found that the Penfield group was the present owner of the rights to the natural gas solely upon the theory that L. W. Smith, receiver of Penfield, had neither requested nor received from the U. S. District Court any authority to sell and convey to the Commonwealth of Pennsylvania any rights to natural gas. *Inter alia*, the court below stated: "It is, therefore, obvious that the Receiver requested authority to sell only surface lands, and received authority only to sell surface lands, and consequently did sell only the surface lands.

* * *

> "In the absence of any authority in the Receiver to sell any minerals whatsoever, they must remain in the Penfield Coal and Coke Company, and become available to the plaintiff trustee, and the creditors whom he represents."

L. W. Smith, in the capacity of receiver, had no authority to sell Penfield's realty except upon the order of the court and he [287-22] could sell only that which the court directed: 45 Am. Jur. § 389, § 391, pp. 306, 307. Such a sale by a receiver is a judicial sale to which the doctrine of *caveat emptor* applies: 45 Am. Jur. § 402, pp. 312, 313.

Penfield's argument is that in the body of the receiver's petition for the sale "wild surface lands" and "surface lands" were mentioned thirteen times and the prayer of the petitioner mentioned "wild surface lands" twice, making fifteen instances wherein surface was mentioned; that the petitioner averred that the Commonwealth was interested in "wild surface lands that are suitable for forestry development" and that among the real estate owned by [Penfield] there are about 3784.35 acres of wild surface land without mineral rights which the company owns in fee, subject to the above recited liens"; that the price of $2.90 per acre did not reflect an adequate consideration for the transfer of oil and gas rights; that the area had not been proven for gas and oil and that throughout the proceedings the only reference was to surface lands.

The background of this particular phase of the litigation is most significant. Penfield, in grave financial difficulties and unable to be operated successfully, was forced to liquidate its assets to meet, if possible, its obligations. The purpose of the receivership proceedings was to make available for the payment and satisfaction of Penfield's creditors not *some* but *all* of Penfield's assets. The only reservation in the *Commonwealth* deed was of "the coal, fire clay, limestone, iron ore and other minerals that had been heretofore sold and conveyed to third parties".

[*i. e. Byrne* and *Hall-Kaul*]. The *Commonwealth* deed further recited: "It is the intention of [L. W. Smith, receiver] to convey by this indenture *all* his rights, title, and interest and *all* the right, title and interest [287-23] of [Penfield] unto and upon the above mentioned warranty". (Emphasis supplied.) The amount of money which the receiver finally realized from the sale of Arnold's Elk County and Clearfield County realty was consumed in the payment of taxes, expenses, costs and fees. No money remained available to liquidate the large mortgage against Penfield and its properties and to pay other creditors. Under these circumstances it is absurd to construe this judicial proceedings as resulting in a sale only of the surface of the land and not of any rights thereunder, including natural gas. Had Penfield's receiver and the U. S. Court contemplated or intended that the sale was to effect a severance of the natural gas rights from the surface of the lands, why then was the receiver discharged by the court while the value of such natural gas rights remained undisposed of and creditors remained unpaid even in part? Neither Penfield nor any representative on its behalf at any time during a quarter of a century ever claimed title to these natural gas rights. It is clear beyond any question that the purpose of the receiver's petition to sell was to divest *all* Penfield's interest in the premises, gas rights as well as surface, and the court so decreed; the *Commonwealth* deed vested in the Commonwealth title to *all* the rights which Arnold had acquired under the *Richey* deed, save those which Arnold had conveyed to *Byrne* and *Hall-Kaul*. Nothing in the present record indicates that either the receiver or the court ever contemplated that the Commonwealth deed effected a severance of the surface

from the natural gas rights. *Yuscavage v. Hamlin*, 391 Pa. 13, 137 A. 2d 242, is apposite. In *Yuscavage, supra*, where the owners of two tracts of land, with the exception of the coal thereunder conveyed "All the surface and right of soil" of the two tracts and the *habendum* clause, very similar to the recitation in the *Commonwealth* deed, recited "and [287-24] also, all the estate, right, title, interest * * * of the grantors", we held that such language conveyed title to the oil and gas under these tracts of land. Like the deed in *Yuscavage, supra*, the *Commonwealth* deed conveyed all the interest of the grantor [Penfield's receiver] in the premises, including the natural gas rights, excepting only that which had been conveyed previously by Penfield's predecessors in title. An examination of the *Commonwealth* deed, read in conjunction with the judicial proceedings which authorized and approved the conveyance, clearly shows that Penfield intended to convey *each and every* interest which it had, save such as had been previously conveyed; no severance of the natural gas rights was ever contemplated by the parties.

The court below was in error in its conclusion that Penfield retained any title to the natural gas rights under this tract. The Commonwealth, beyond any doubt, is the present owner of all the natural gas rights under Parcels 1, 2, 3 and 4.

Decree reversed. Costs to be divided between the appellees and all of the appellants, except the Commonwealth of Pennsylvania.

Appendix "A".

[287] DISSENTING OPINION

MUSMANNO, *J.* Filed: April 18, 1960

In this case mineral rights were conferred through the medium of the following language:

> "All the coal, coal oil, and other minerals of every kind and character in, under and upon."*

I assert that this phraseology conferred on the grantee the rights to the natural gas in and on the property involved because (1) "*every kind and character*" is expansive enough a phrase to include natural gas; and (2) the grantor intended gas to be included therein. The Majority Opinion finds a way to say that when the grantor said "all other minerals of every kind and character," he did not intend to include natural gas. Is gas not a mineral? From time immemorial the substantive world has been divided into three kingdoms: the animal, vegetable and mineral. If gas is excluded from the mineral kingdom, where does it go? It cannot move into the animal or vegetable kingdom. Does it float about, a pariah to all kingdoms, or is a new kingdom being founded for its exclusive [287-2] occupancy? And does this mean that the world must now be re-divided into four kingdoms, instead of three?

In *Silver v. Bush*, 213 Pa. 195, at 197: (1906) we said:

> "Of the fact that under the broad division of all matter into the three classes of animal, vegetable and mineral, *petroleum and gas are minerals*, there has never been any room for question, and even under some more restricted classifications the same result may be reached."

* Italics throughout, mine.

Are we abandoning this solid promontory of logic, reason, and common sense? If we are, I can only say that once you depart from the moorings of good, clear understandable English and embark on the sea of unrestrained interpretive expression, anything is possible—but that is not the way to decide a lawsuit, especially where property rights are involved—property rights which have been documented by deeds, mortgages, and incontestable court records.

Let us now look the facts in this lawsuit and endeavor to determine what caused the Majority to move to a conclusion which, as I see it, is entirely illogical an wholly insupportable. On June 25, 1900, N. T. Arnold of Clearfield County obtained title in fee simple from I. F. Richey, *et al.*, to four tracts of land comprising 3784.3 acres. On the same day he obtained title from the same Richey, *et al.* to mineral rights in fifteen other tracts of land. The mineral rights in these other fifteen tracts were conveyed in the following language:

> "All the coal, coal oil, fire clay and other minerals of every kind and character."

The deed also contained this illuminating provision:

> "It is the intention of the grantors herein to convey to the said N. T. Arnold all the land, coal, coal oil, fire clay, *natural gas* and other minerals and all rights vested in said grantors."

Thus, this provision quite clearly established that Arnold obtained title to the natural gas in the fifteen tracts (which are not here at issue.) Nor is it questioned that he acquired the gas rights in the four [287-3] tracts here involved since his title to these tracts was a fee simple one. The question is who *now* owns the gas rights in those four tracts.

Appendix "A".

On June 25, 1900, that is, the same day that Arnold obtained the four tracts and the fifteen other tracts, he conveyed to John P. Byrne the rights to:

> "All the coal, fire clay, limestone, iron ore and other minerals in and under"

in two of the four tracts.

A month later he conveyed to K. P. Hall and Andrew Kaul

> "All the coal, coal oil, and all other minerals of every kind and character in, under and upon"

the other two parcels of the four mentioned.

Later on, the New Shawmut Mining Company, one of the party contestants in this case, acquired all the rights which Byrne and Hall and Kaul (hereinafter to be referred to as Hall-Kaul) had in these four tracts. It is admitted by everyone in this law suit that New Shawmut got whatever Byrne and Hall-Kaul had.

It is my considered judgment that the New Shawmut Mining Company, under the language already quoted, obtained indefeasible rights to the natural gas underlying the four tracts. But the Majority says that New Shawmut did not get title to the natural gas, arguing that:

> "Arnold's omission of natural gas, coupled with the variation in the delineation of the minerals expressly conveyed to Byrne and Hall-Kaul, indicates that Arnold did *not* intend to convey *all* the mineral rights he had received from Richey *et al.*" (Emphasis in Majority Opinion.)

In other words, when Arnold said: "all other minerals of every kind and character," he did not mean all other minerals of every kind and character. Also, that when he

enumerated certain minerals and then added "and other minerals in and under," he did not mean to include natural gas in "other minerals in and under."

[287-4] Let us see if Arnold did not intend to include natural gas in the all-embrasive language he used in conveying his mineral rights in the four tracts. We have seen that he made the first conveyance of mineral rights in two of the four parcels of land on June 25, 1900, the same day that he had received the mineral rights in the fifteen tracts. In this conveyance he had accepted the word "gas" as a mineral and had contracted with respect thereto on that basis. Why would not the term "mineral" in the deed *from* him to Byrne not be given the same meaning it was given in the deed *to* him? Especially when the latter deed shows that the Byrne deed was already in contemplation of the parties, since it makes specific reference to it as follows:

"* * * excepting such interest as was heretofore conveyed * * * to John Byrne, Trustee as of this date." In fact, the deed to John Byrne was recorded before the deed to Arnold.

Since these two deeds (the one to Arnold and the one from Arnold) were warp and woof of the same transaction, can the word *mineral* be given one interpretation in one conveyance and another meaning in its twin conveyance? In *Silver v. Bush, supra*, cited by the Majority Opinion with enthusiastic approval, this Court said:

"The crucial question * * * is what was the sense in which the parties used the word."

In what sense could Arnold, Byrne and Hall-Kaul use the word mineral except to include natural gas, in view

of the specific language to that effect in the Richey deed covering the mineral rights to Arnold? Let us see further how Arnold regarded the deeds in which he conveyed mineral rights to Byrne and Hall-Kaul in June and July, 1900. He lived six years after these conveyances. During those years he did not attempt to sell the natural gas rights to anyone nor did he indicate in any manner that he had withheld the rights to natural gas from the grant of "all other minerals."

[287-5] Arnold died August 4, 1906, insolvent. His personal representatives petitioned the Orphans' Court of Clearfield County to sell all his property for payment of debts. A Schedule "C", listing all Arnold's properties, was attached to the petition. This schedule described Arnold's rights in the four tracts as "*surface only.*" One of Arnold's personal representatives incidentally was his widow, who had been a co-grantor in the deeds to Byrne and Hall-Kaul. If anyone would know the intention of Arnold when the mineral rights were conveyed to Byrne and Hall-Kaul, it would be she. She recognized that *all* mineral rights had been conveyed to Byrne and Hall-Kaul, thus leaving to Arnold and herself only the surface rights in the four tracts. Accordingly, the formal document describing Arnold's rights in the four tracts specified "Surface Only."

And more. The Orphans' Court approved the sale of the "surface only" in the four tracts to one B. F. Thompson who naturally could only receive what the Court approved, namely, surface only.

If the intention of the parties is to be the touchstone to determine whether gas is to be regarded as a mineral or

not in the transaction under consideration, it would be difficult to conceive of more convincing proof that Arnold intended to pass the natural gas rights in the four tracts to his grantees than the fact that his representatives, including his wife, recognized that Arnold had already conveyed "all" the minerals to Byrne and Hall-Kaul and that, therefore, "surface only" was left in their title to the four tracts; which is all they listed as their assets, in so far as these four tracts are concerned.

However, not only does the Majority reject this clearest proof of recognition of past conveyance of mineral rights by Arnold, but it goes further and says that although the Petition described Arnold's title as "surface only," and although the Court approved the sale of "surface only", and although the deed in pursuance of the order of Court conveyed "surface only" to B. F. Thompson, the gas rights were nevertheless included in the [287-6] petition and authorized for sale by order of Court and conveyed to B. F. Thompson! This must be known as the theory of inclusion by exclusion.

And how does the Majority explain the phenomenal conclusion indicated. It says:

> "Even though the descriptions of Parcels 1, 2, 3 and 4 were prefaced as 'surface only', yet Arnold's personal representatives both in their petition and attached schedule, did represent to the Court that they had listed *all* of Arnold's interest in realty in Clearfield County." (Emphasis in Original)

Thus, the Majority argues that although Arnold's representatives specifically declared *what* their rights were in

four tracts, this meant nothing since they said they re going to sell all their property—and someone else ided for them that they still had what they had already veyed away. Of what use is a schedule in a formal rt authentication if, through an *ex parte* proceeding, schedule may be altered, mutilated, and nullified?

f we following the Majority's reasoning in this phase the case to its logical conclusion we will find that a gerous precedent is being established. It will mean t no one, looking over the record of Court authenti- ed sales, can now be certain of what was actually sold ause, although a schedule specifically enumerates what been sold, there is always the possibility that a later rt in an entirely different and independent proceed- may declare the schedule added to, subtracted from, completely nullified.

hus, according to the Majority, although Thompson's l gives him the "surface only" to the four tracts, he fact received the subterranean rights as well. Of rse, this reasoning on the part of the Majority is all *post facto*, because no one, while the property rights e being [287-7] transferred, could have foreseen or gined what this Court is now deciding*.

ome nine months later, on February 23, 1910, Thomp- sold his rights to the Penfield Coal and Coke Com-

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he fact that between the descriptive and *habendum* clauses of the Deed ompson there appeared "Together with the right and privilege of enter- on such lands as are not conveyed and being described herein and taking said coal, coal oil, natural gas, fire clay and other minerals of every and character," cannot enlarge the interest conveyed in the body of the namely, "Surface only." Such clauses are merely used for the pur- of granting easements appurtenant to the rights already granted, that give rights of egress, regress and ingress to secure the minerals already d.

pany. Obviously, Penfield could not receive more than Thompson had to sell, and Thompson could not have had more than he obtained from Arnold's representatives, and the representatives could only have inherited what Arnold had left to them, namely, surface rights only.

A year or so after Penfield became owner of the surface rights only in the four tracts, an error was discovered in the deed from Thompson, and a correcting deed, referred to also as a quitclaim deed, was made up by the Arnold trustees, directly to Penfield. Although the Majority regards this quitclaim deed as assuring to Penfield the gas rights underlying the four tracts, Penfield itself acted all the time on the assumption and belief that it had only surface rights to the land. On March 1, 1910, in a mortgage in the Guarantee Title and Trust Company, by which it expressly undertook to place in trust *all* of its property, real, personal and mixed and *all* rights, privileges and franchises of the Company, in order to secure $700,000, Penfield described its rights in the four tracts only as "*surface.*" Nor did it make any changes in this mortgage after the correcting deed had been executed. Even Penfield's own map of its holdings, introduced in evidence in this litigation, and dated 1920, showing the acreage here involved, marked its rights in the acreage as "surface" alone.

[287-8] In 1926 Penfield found itself in serious financial difficulties and the United States Court for the Western District of Pennsylvania appointed one L. W. Smith as receiver to handle its affairs. Smith petitioned the Court to sell the four tracts of land here involved. He described Penfield's property rights in these lands as "wild surface

lands in fee *but without minera. rights.*" Along the whole lengthening chain of title to these lands, after the Byrne and Hall-Kaul deeds, we find continuous and constant reference to rights in the lands as "surface" only. The interpretation placed upon all the conveyances by the parties themselves speak louder than the strained construction adopted by the Majority which not only defies the expressed intention of the parties but construes the terms to mean the exact opposite of what they say.

When Smith, the receiver of the Penfield properties, petitioned the United States District Court for authority to sell Penfield's interests, he specifically and expressly limited Penfield's ownership to the wild surface land only. In the clearest of language he said:

"14. That among the real estate owned by the Penfield Coal & Coke Company there are about 3784.35 acres of *wild, surface land without mineral rights* which the company owns in fee, subject to the above recited liens.

"15. That the said *surface lands* are of a rough and mountainous character, are not now productive and never were productive to the company. That the said *surface lands* were never used by the Penfield Coal & Coke Company and are not either useful or necessary to carry on *coal mining operations* on these properties, if at any time such operations should be resumed. The annual local taxes assessed against the said surface lands amount to about $500.00.

"16. That the department of Forests and Waters of the Commonwealth of Pennsylvania is desirous of acquiring the said *surface lands*. . . .

"17. That the said surface lands referred to in the said contract with the Commonwealth of Pennsylvania are bounded and described as follows. • • •"

[287-9] Throughout Paragraphs 18, 19 and 20, Smith's reference to the Penfield's land was always "surface lands." In his prayer he requested to be authorized to sell "3784.35 acres of wild surface land in fee but without mineral rights, as hereinbefore described • • •". The Court granted the prayer in the petition.

And then, after the sale had been consummated, the Receiver filed his Report and Return of Sale, in which he said:

"2. That by order of your honorable court entered June 2, 1931 the Receiver was authorized to offer at public sale to the highest bidder four certain tracts of *wild surface* land • • •"

In Paragraph 4 of the report, the Receiver states that the highest bid received for the "wild surface land" was that of the Commonwealth of Pennsylvania, Department of Forests and Waters, and that, therefore, the "surface land" was sold to the Commonwealth, the sale having been conducted strictly in accordance with the Order of the Court.

The Court then confirmed the sale of 3784.35 acres of "surface lands" to the Commonwealth, authorizing the Receiver to deliver a deed "for the said surface lands" upon payment of the purchase money. And thus the fateful four tracts of land without mineral rights became the property of the Commonwealth. And upon this showing, the Majority came to the conclusion that the Commonwealth received the rights to the natural gas in the land!

In arriving at this astonishing conclusion, the Majority makes no effort to explain how it is that in all of the 57 years which elapsed between the granting of the mineral rights to Byrne and Hall-Kaul (which rights now belong to the New Shawmut Mining Company) and the initiation of this lawsuit, the only ones who paid taxes on the minerals were Byrne and Hall-Kaul and the New Shawmut Mining Company.

The Majority Opinion, I am sorry to say, is an aggregation of contradictions. Although it says, not once, but many times, that the test in determining whether gas is included in the term mineral is to be decided [287-10] by the intention of the parties expressed and implied, it has completely ignored the expression of the parties expressed in countless ways, as only briefly enumerated by me in this Dissenting Opinion.

It is a melancholy fact in history that many a tribunal, having once concluded that it has reached a correct result, becomes unconcerned about the manner in which it justifies its decision. In such attempted justification inconsistency does not worry, illogical conclusions do not distress, unfounded premises are treated as of no consequence. Since it assumes that the capstone is correct, it does not matter how much straw is stuffed into the pyramid to support the apex.

For instance, the Majority here argues that Byrne and Hall-Kaul could not have obtained or even wanted the natural gas rights in the four tracts. It says that:

> "The mining of coal, not the recovery of gas, was the principal objective of the Byrne and Hall-Kaul conveyances; in fact, John Byrne's principal duties as trustee were in connection with the recovery of coal."

But I respectfully suggest that the test of principal objective is no test at all in arriving at the proper decision in this case. If we would apply this principal objective test to the other conveyances we have encountered in the chronology of title we would have to ask "Was it the principal objective of N. T. Arnold to recover gas, yet no one questions that he received the gas rights in the original conveyances. Was it the principal objective of Penfield Coal and Coke Company, which was in the coal and coke business, to recover gas, yet the Majority held that Penfield obtained title to the gas in the property? Was it the principal objective of the Commonwealth's Department of Forests and Waters to gather up gas? What does the Department of Forests and Waters have to do with the recovery of natural gas?" And yet the Majority has given title to the gas to the Department of Forests and Waters.

[287-11] In order to arrive at the conclusion reached by the Majority, one must find that practically everyone involved in writing conveyances, drafting Court orders, preparing documents and presenting exhibits desired to mock the English language, make sport of rules of grammar, distort the meaning of the simplest words, and ignore the sequence of cause and effect. Thus, if the Majority conclusion is to be accepted as law, we must find that when Arnold said "minerals of *every kind* and description," he did not mean every kind and description. We must find that when Arnold's personal representatives said "surface rights alone" they really meant surface and sub-surface rights. We must find that when the Orphans' Court used the words "surface rights," they did not mean only the surface, on which there is no gas but the inner strata as well where there is gas. We must find that when Thompson conveyed "all of the surface" to Penfield, he really

meant all of surface and all of the subterranean terrain as well. We must find that when Penfield described its rights in the tracts as "wild surface lands", it meant not only the wild land above the surface, but the wild natural gas beneath. We must find that when the Receiver of Penfield petitioned the United States District Court to sell the "wild surface lands but *without* mineral rights," he really meant wild surface lands but *with* mineral rights. We must find that the United States District Court in granting the petition in the words of the Receiver intended to go beyond what was requested, what was intended, and what was legal. We must find that when the Receiver sold the land to the Commonwealth, Department of Forests and Waters, and reported to the Court that he had sold only the wild surface land that he really did not mean what he said, that he was misrepresenting matters to the Court, and that he really sold the wild surface land and the wild, uncontrolled natural gas beneath. And we must find that although the Commonwealth's [287-12] Department of Forests and Waters was only interested in buying the wild surface land it was forced to accept the natural gas for which it has no use and with which as a Department of the Commonwealth's government it is not required to cope.

We must do all these things, which deride the purpose of language, are cynical of the dictionary, do violence to logic, upset Court decisions, and, worst of all, establish a precedent which will puzzle the learned, confuse the unlearned, and introduce into the law of real estate a quality of instability as fugacious as the natural gas which is the subject of this lawsuit.

Since I am not prepared to go along with such plethora of paradox, I must, and do, dissent.

APPENDIX "B"

ENDORSEMENT:

IN THE SUPREME COURT OF PA.
EASTERN DISTRICT
No. 250 January Term, 1959

CECIL B. HIGHLAND, JR., Trustee, etc.,
vs.
COMMONWEALTH OF PENNA. *et al.*,

APPEAL OF RIDGEWAY NATIONAL BANK, *et al.*, etc.

PETITION FOR REARGUMENT

FILED IN SUPREME COURT
APR 27 1960
EASTERN DISTRICT

Petition Denied
Per Curiam
June 27, 1960

JOHN A. METZ, JR.,
METZ, COOK, HANNA & KELLY,
3600 Grant Building,
Pittsburgh 19, Pennsylvania.

APPENDIX "C"

Act of March 9, 1832
P. L. 190, Secs. 31-34.

"Sect. 31. The Orphans court which possesses jurisdiction of the accounts of an executor, administrator, or guardian, shall have power to authorize a sale or mortgage of real estate by such executor, administrator or guardian, in the following cases, *viz*:

"I. On the application of the executor or administrator, setting forth that the personal estate of the decedent is insufficient for the payment of debts and maintenance and education of his minor children, or for the purpose of paying the debts alone.

"II. On this application of such executor or administrator, or of any person interested, setting forth, that on the final settlement of the administration account, it appears that there are not sufficient personal assets to pay the balance appearing to be due from the estate of such decedent, either to the accountant or others.

"III. On the application of a guardian, setting forth that the personal estate of the minor is insufficient for his maintenance and education, or for the improvement and repair of other parts of his real estate, or that the estate of said minor is in such a state of delapidation and decay, or so unproductive and expensive, that it would be to the interest and benefit of said minor, in the judgment of said court, that the said estate should be sold, and the Orphans court of the county wherein any such real estate may be situate, shall have the same authority to direct a sale in this latter case, as in the cases particularly mentioned in the thirty-second section of this act.

"Sec. 32. When the real estate, with respect to which, application shall be made to the Orphans court, in the cases mentioned in the preceding section, is situated in the same county, the said court may order the sale or mortgage of such part, or so much of such real estate as to them shall appear necessary, when the real estate is situated in another county or counties, or in the same and another county or counties, and the Orphans court which possesses jurisdiction over the accounts of such executor, administrator or guardian, shall be satisfied of the propriety of a sale or mortgage of some portion of such real estate not within their jurisdiction, it shall be lawful for such court to make a decree, authorizing such executor, administrator or guardian, to raise so much money as the said court may think necessary, from real estate situated in such county or counties as they may designate; and thereupon, it shall be the duty of the Orphans court of the county wherein the real estate so designated is situated, upon the petition of such executor, administrator or guardian, to make an order for the sale or mortgage, as they shall think expedient, of so much, and such parts of such real estate, as shall, in their opinion, be necessary to raise the specified sum; and such executor, administrator or guardian, shall in all cases make return of his proceedings in relation to such sale or mortgage, to the Orphans court of the county in which the real estate so sold or mortgaged lies, and, if the same be approved by the court, it shall be confirmed.

"Sec. 33. That no authority for the sale or mortgage of real estate, lying in the same or another county or counties, shall be granted, until the executor, administrator

or guardian, as the case may be, shall have exhibited to the said court a true and perfect inventory and conscionable appraisement of all the personal estate whatsoever of the decedent or minor, as the case may be, together with a full and correct statement of all the real estate of such decedent or minor, wherever situated, which has come to his knowledge; and also, in the case of an executor or administrator, a just and true account upon oath or affirmation, of all the debts of the decedent which have come to his knowledge; nor in any case shall such authority be granted, until such executor, administrator or guardian, shall have filed in the office of the clerk of the said court, a bond, with sufficient security, to be approved of by the court, conditioned for the faithful appropriation of the proceeds of such sale or mortgage, according to their respective duties: *And provided further*, That no real estate contained in any marriage settlement, shall, by virtue of this act, be sold or disposed of contrary to the form and effect of such settlement, and that the mansion house or most profitable part of the estate, shall be reserved to the last.

"Sec. 34. In all cases where an application shall be made to any Orphans court, for a decree authorizing the sale or mortgage of real estate, under any of the provisions contained in this act, the court may appoint suitable persons to investigate the facts of the case, and to report upon the expediency of granting the application, and the amount to be raised by such sale or mortgage; and upon such report being made, the court may decree accordingly."

Appendix "C".

ACT OF MARCH 9, 1832.
P. L. 190, Section 57.

Sect. 57. The manner of proceeding in the Orphans court, to obtain the appearance of a person amenable to its jurisdiction, and to compel obedience to its orders and decrees, shall be as follows:

#I. On the petition to the court, of any person interested, whether such interest be immediate or remote, setting forth facts necessary to give the court jurisdiction, the specific cause of complaint, and the relief desired and supported by oath or affirmation, the Orphans court or any judge thereof in vacation, may award a citation returnable at a day certain, not less than ten days after the issuing thereof.

#II. Such citation may be served by the party obtaining the same, or by any authorized agent, or if required by the party, it shall be served by the sheriff or coroner, as the case may require of the proper county.

#III. The manner of service shall be by giving a copy thereof to the defendant personally, or by leaving such copy with some member of his family, at his last place of abode.

#IV. If the defendant be not found, and have no known dwelling place within the county, such citation may be served in like manner upon the person or persons, who may be the surety or sureties of such party, in any bond or recognizance given by him, for the performance of any trust or duty in respect to which such citation may have issued.

#V. The return to a citation, if made by the party on whose petition it issued, or his agent as aforesaid shall be on oath or affirmation, and in all cases of service, the return shall state how such citation was served.

#VI. If the party to be cited cannot be found, and have no known dwelling place within this commonwealth, and there is no surety on whom service of the citation can be made as aforesaid, and the facts shall be so stated in the return on oath or affirmation by the party complaining, or by some one competent to make affidavit in that behalf, the Orphans court may award another citation, returnable in like manner with the first.

#VII. At the time of awarding such second citation, the court may make an order for publication of the same in two or more newspapers, to be designated by the court in such place or places and for such length of time as the court, having regard to the supposed place of residence of the defendant, and other circumstances, shall direct.

#VIII. At the time appointed for the appearance of the defendant, should he not appear, according to the requisition of the citation, and if due proof be made of the service thereof, or when service cannot be made, of the publication thereof, as hereinbefore prescribed, the court may, with or without another citation, as justice may require, proceed to make such order or decree in respect to the subject matter as may be just and necessary.

#IX. It shall be lawful for the court, on such proof, to order that the petition of the complainant be taken as confessed, and to direct a reference to an auditor or auditors to take proof of the facts and circumstances set

forth in the petition, and to report thereon, and also to report an account against such defendant if necessary.

#X. On the report of the auditor or auditors the court shall make such order or decree thereon as may be just and necessary.

#XI. Compliance with an order or decree of the court may be enforced by attachment or sequestration, or in case of a decree for the payment of money, against a party who has appeared, the complainant may have a writ of execution in the nature of a writ of *fieri facias*, which writs may be allowed by the court or by any judge thereof, in vacation.

#XII. Writs of attachment and sequestration shall be directed to and executed by the sheriff or coroner, as the case may require, of the proper county.

#XIII. Writs of sequestration shall be in the following form:

The Commonwealth of Pennsylvania, To the sheriff of the County of Greeting:

WHEREAS, A. B. (here set out the decree, or so much thereof as is material to explain the duty to be performed.) Therefore we command you that you do, at proper and convenient hours in the day time, go to and enter upon all the messuages, lands, tenements, and real estate of the said A. B. and that you do collect, take, and get into your hands, not only the rents, issues, and profits of all his said real estates, but also all his goods, chattels, and personal estate, and detain and keep the same under sequestration in your hands; and also that you attach

all stocks held by him in incorporated companies, and keep the same under attachment until our said Orphans court shall make other order to the contrary; and you are to return with this writ an inventory or schedule of the property you have sequestrated or attached, and a certificate under your hand of the manner in which you shall have executed this writ, to our said court, on the day of next. Witness, &c.

#XIV. A sequestration shall not abate by the death of the complainant or defendant.

#XV. It shall be the duty of the sheriff or coroner, as the case may be, immediately after receiving any such writ of sequestration, to file a copy thereof in the office of the prothonotary of the court of Common Pleas of the same county, who shall, forthwith, enter the substance thereof on his docket, with the names of the parties, and the entry thereof shall thenceforward operate to charge the real estate of the defendant, according to the form and effect of such writ, and shall bind the same in the hands of all purchasers and mortgagees, subsequently to such entry, without other notice: *Provided*, That if such sequestration shall be dissolved by the order of the Orphans court, the defendant, or any person interested in such real estate, may have a certificate of the same from the clerk of the said court, which it shall be the duty of such clerk to furnish, on application, and which, being entered on the docket, shall have the effect of a satisfaction of such lien.

#XVI. Writs of *fieri facias* shall be directed to, and executed by the sheriff or coroner, as the case may require, of the proper county, and the proceedings thereon shall be

the same as on writs of *fieri facias* issued by the court of Common Pleas of the same county.

#XVII. When proof shall be made on oath or affirmation, to the satisfaction of the court if in session, or to any judge thereof in vacation, at the time of filing a petition as aforesaid, that the defendant has absconded, or is about to abscond or depart from his usual place of abode, to the prejudice of the complainant, it shall be lawful for the court or for such judge to allow the issuing of a writ of attachment, or a writ of sequestration, or both in the first instance, against such defendant, and on the return thereof, the like proceedings may be had as are authorized on the return of a citation.

#XVIII. If such attachment or sequestration, issued in the first instance, be executed, the court, or any judge thereof in vacation, may dissolve the same, on the defendant giving security, to the satisfaction of the court, or of such judge, to appear on a day certain, to answer to the petition and to abide the orders and decrees of the court in the premises.

#XIX. When proof shall be made on oath or affirmation, to the satisfaction of the court, or of any judge thereof in vacation, at the time of presenting a petition or at any stage of the cause, that the defendant therein named has in his possession, trust, property or effects, which he is wasting, or otherwise disposing of contrary to his duty and trust, or that he is about to abscond and carry such trust property or effects, out of the jurisdiction of the court, it shall be lawful for the court, or such judge in vacation, to award a writ in the name of the commonwealth, to the sheriff or coroner, as the case may require, of the prop-

er county, returnable on a day certain, to an Orphans court, to be convened for the purpose, if the said court shall not then be in session, commanding him to take possession of all such trust, property and effects specified in such writ, and to hold the same subject to the order of the court, and also, to attach all debts due to such trust, whether by bond, mortgage or otherwise, and all stocks in incorporated companies, and serve a copy of such writ upon each debtor, and upon each company in which stock may be held belonging to the trust as aforesaid: *Provided*, That before the execution of such writ, the sheriff or coroner, as the case may be, may require of the party at whose instance such writ may have been issued, sufficient security to indemnify him against any damages arising from the execution thereof: *And provided also*, That if the party, against whom such writ may issue, shall give sufficient security to such sheriff or coroner, that the trust property or effects specified in such writ, shall be forthcoming at the return thereof, then such sheriff or coroner, shall not execute the same, but shall make return of the facts to the court.

§XX. The like proceedings may be had, where the court has made a final order and decree, for the delivery of the trust, property and effects by the defendant to any persons, who may be designated by law, or by the order of the court to receive them.

§XXI. On the return of such writ, the court may take such order respecting the disposition of such trust, property and effects, as may be necessary and proper, according to the principles of justice and equity.

§XXII. When a decree shall have been had against any defendant, who shall not have appeared according to

the requisitions of the citation, and a sequestration shall have issued against the real or personal estate of such defendant, the court may order the decree to be satisfied out of the estate, and effects sequestrated: *Provided*, That such order shall not be carried into execution, until the complainant shall have given security to the satisfaction of the court to abide the order of the court, touching the restitution of what he may have received, in case the defendant shall appear, and be admitted to defend the suit, but if such security shall not be given, the estate and effects sequestered, or the proceeds thereof, shall remain subject to the directions of the court to abide its further order.

#XXIII. If the defendant against whom such decree shall have been made, or his representatives shall within one year after personal notice of such decree, and within five years after the entry thereof, when no such notice shall have been given, present a petition to the same court praying to be admitted to be heard, and shall pay such costs as the court shall adjudge, the party so petitioning shall be admitted to a defence, and the case shall then proceed in like manner as if such defendant had appeared in due season, and no decree had been made.

#XXIV. If such defendant or his representatives, shall not within such period present a petition as aforesaid, the court may make such final order and decree, both in respect to any estate or effects that may have been sequestered, and in respect to the matters in controversy in the case, as may be according to justice and equity, and may, if necessary, award a writ in the nature of a *fieri facias*, in the manner herein provided, as in the case where the defendant appears.

Appendix "C".

#XXV. When any executor, administrator or guardian, shall reside or move out of the county in which his appointment shall have taken place, or shall not possess real or personal estate in such county, sufficient to satisfy any decree or order of the Orphans court of such county, it shall be lawful for the Orphans court of such county to issue process to the county in which such executor, administrator or guardian, may be, or in which he may have any real or personal estate, amenable to such process, and such process shall be executed by the sheriff or coroner, as the case may require, of the county in which such executor, administrator or guardian may be, or may possess real or personal estate as aforesaid.

APPENDIX "D"

IN THE
SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

No. 250 January Term, 1959.

CECIL B. HIGHLAND, JR., Trustee of the Penfield Coal & Coke Company; an out-of-existence corporation, and E. C. METZNER, Lessee,

v.

COMMONWEALTH OF PENNSYLVANIA, NEW SHAWMUT MINING COMPANY, a corporation, SEBASTIAN C. PUGLIESE and GRACE PUGLIESE, A. J. PALUMBO and SIGISMUNDA PALUMBO, RIDGEWAY NATIONAL BANK, BRUCE ISAACSON and JOHN BELL, SUCCESSOR TRUSTEES UNDER THE WILL OF N. T. ARNOLD, and DEVONIAN GAS AND OIL COMPANY, Defendants, and NEW YORK STATE NATURAL GAS COMPANY, Intervening Defendant,

Appellants.

APPEAL OF RIDGEWAY NATIONAL BANK, BRUCE ISAACSON AND JOHN BELL, SUCCESSOR TRUSTEES UNDER THE WILL OF N. T. ARNOLD.

PETITION FOR REARGUMENT

To the Chief Justice and the Justices of the Supreme Court of Pennsylvania:

Appendix "D".

The Petition of Ridgeway National Bank, Bruce Isaacson and John Bell Successor Trustees under the Will of N. T. Arnold, respectfully represents:

1. That your Petitioners are the Appellants before your Honorable Court at the above number and term.

2. That on April 18, 1960 your Honorable Court handed down an opinion per Mr. Justice Benjamin R. Jones, and entered an Order reversing the decree below and awarding the property involved to the Commonwealth of Pennsylvania. A copy of said opinion and order and a copy of a dissenting opinion filed by Mr. Justice Musmanno are filed with this Petition.

3. That your Petitioners respectfully believe and represent that in its said Opinion and Order your Honorable Court overlooked and misapprehended three points of fundamental importance which are as follows:

I.

YOUR HONORABLE COURT ADJUDICATED TITLE TO PARCEL 3 NOTWITHSTANDING THAT SAID PARCEL HAD BEEN WITHDRAWN FROM CONSIDERATION IN THIS APPEAL.

Prior to oral argument this appeal was remanded by your Honorable Court for further hearing. The court below thereupon entered an Order permitting discontinuance of the suit without prejudice with respect to Parcel 3. The title to said Parcel was, therefore, not before your Honorable Court when oral argument was had and is not now before the Court. Hence the adjudication as to that Parcel is erroneous and must be withdrawn.

Appendix "D".

II.

YOUR HONORABLE COURT'S CONSTRUCTION OF THE ACT OF MARCH 9, 1832, P. L. 190, RENDERS THAT STATUTE UNCONSTITUTIONAL AS IN VIOLATION OF THE DUE PROCESS CLAUSE (THE 14TH AMENDMENT, SECTION 1) OF THE FEDERAL CONSTITUTION.

The 14th Amendment, Section 1 of the Constitution of the United States reads as follows:

> "Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

In *Hess v. Westerwick*, 366 Pa. 90, at pages 96-97, your Honorable Court referred to this due process of law clause of the Federal Constitution in the following words:

> "It is a fundamental provision of both our state and federal constitutions that no person shall be deprived of property except by the law of the land or due process of law. Without due process of law the right of private property cannot be said to exist. As said by Mr. Justice Pitney in *Ochoa v. Hernandezy Morales*, 230 U. S. 139, 161 (1912), 'The principle, known to the common law before Magna Charta, was embodied in that charter (Coke, 2 Inst. 45, 50) and has been recognized since the Revolution as among the safest foundations of our constitutions. Whatever else may be uncertain about the definition of the term "due

process of law" all authorities agree that it inhibits the taking of one man's property and giving it to another, contrary to settled usages and modes of procedure, and without notice or an opportunity for a hearing.'"

The real estate, title to which is in question on this appeal, is the natural gas underlying Parcels 1, 2 and 4. This real estate is unquestionably property within the protection of the due process clause.

As recognized by your Honorable Court (page 2 of the Opinion) title to the natural gas in question was vested in Arnold whose interest therein is represented by your Petitioners.

Your Honorable Court also agreed with the following three positions taken by your Petitioners:

(1) "That under the terms of Arnold's Will his personal representatives were given no authority to deal with his realty and that, in the absence of any such testamentary authority Arnold's personal representatives were without any authority to deal with his realty unless and until empowered to do by a court of appropriate jurisdiction." (Opinion page 17); and

(2) "That the Arnold executors' deed was dependent for its validity upon the terms of the Order of the Orphans' Court" (Opinion page 18); and

(3) That in the Executors' Petition for Sale upon which the Court authorized sale "the descriptions of Parcels 1, 2 * * * and 4 were prefaced as 'surface only'". (Opinion page 19).

Notwithstanding these positions your Honorable Court held that said Order on said Petition authorized the sale

of the natural gas in addition to the surface because of the position taken by your Honorable Court that "the Executors fully intended to sell *all* of Arnold's interest in realty in Clearfield County of whatever nature." (Opinion page 19.)

It thus appears that your Honorable Court has construed the Act of 1832 under which the Petition was filed and Order made as authorizing the sale of real estate not described in the Petition and not covered by the Order of Court. The Statute as thus construed, we respectfully submit, permits the taking of the property of the Arnold Estate without due process of law and is, therefore, repugnant to the Federal Constitution.

The Act of 1832 to which we have referred set forth at the time of the Executors' sale here involved (1909) the "settled usages and modes of procedure" (in other words "the law of the land") by which alone the property of the Arnold heirs could be taken away for the payment of Arnold's debts.

Reference to the terms of that Statute shows that it contained the following provisions constituting the fixed procedure:

(a) The Executors were required to exhibit to the Court "a full and correct statement of all the real estate of such decedent * * * wherever situated which has come to his (the executor's) knowledge". (See Appellants' brief at this number and term, page 27.)

(b) The Act specifically provided that "No authority for the sale * * * of real estate * * * shall be granted until the executor * * * shall have ex-

hibited to the said court" the full and correct statement of real estate thus required. (Appellants' brief on this appeal, pages 26-27.)

(c) The Court was empowered upon receiving such a Petition to "appoint suitable persons to investigate the facts of the case and to report upon the expediency of granting the application and the amount to be raised by such sale." (Appellants' brief on this appeal, page 27.)

(d) Either with or without the appointment of such persons to investigate, the Court was empowered "to make an Order for the sale * * * of so much and such parts of such real estate as shall, in their opinion, be necessary to raise the specified sum." (Appellants' brief on this appeal, page 26.)

It is thus made clear by the Legislature that no authority could be granted by any court for the sale of a decedent's real estate for the payment of his debts unless that real estate was fully and correctly stated to the court as part of the petition. No authority was given to any court to authorize the sale of real estate which was not set forth in the executor's "full and correct statement of all of the real estate of such decedent * * * which has come to his knowledge." In any event the court was only empowered to make an order for the sale "of so much and such parts of such real estate" described in the executor's statement as the court should think necessary to raise the specified sum. The Legislature did not authorize any court to authorize the sale of real estate not reported and exhibited to the court by the executors in the latter's requisite "full

and correct statement of all the real estate of such decedent * * * which has come to his knowledge."

All that the executors of the Arnold Estate exhibited to the court in their statement attached to the Petition in this case was "surface only" of Parcels 1, 2 and 4. Under the Statute, therefore, all that the Court could properly authorize to be sold was "so much and such parts of such real estate" ("surface only") as the Court deemed necessary to raise the money.

Notwithstanding this and the plain language of the Statute your Honorable Court has held that the statute permitted the Court to authorize the sale of the natural gas which was not part of "surface only" and nowhere described or exhibited to the Court as real estate of the decedent which had come to the knowledge of the Executors.

This construction, we submit, permits the taking away of the natural gas belonging to the Arnold Heirs without said gas ever being considered or thought of, without any possibility of the Court appointing investigators to determine its value and whether it should be sold and without any opportunity for the Court itself to pass on the question of whether all or any part of the gas should be sold to raise the money. The construction clearly permits the taking away of this natural gas without any judicial procedure whatever as to that gas. If the statute means what your Honorable Court has held it to mean then it could just as well have included wholly separate and other tracts of surface or other real estate rights equally unknown to the Executors and to the Court and equally omitted from and not included in the Petition and the Order granted

hereon. So construed it is palpably in contravention of the due process clause of the Federal Constitution.

We submit that this error on the part of your Honorable Court was the result of the Courts falling into the mistake of trying to find and follow the subjective intention of the Executors.

It is to be remembered that the Executors deed which was given after the Order of Court and which derived its validity only from the Order of Court and could not go beyond the terms thereof was itself never exhibited to the Court.

What the Executors thought they were doing or wanted to do or otherwise intended is wholly irrelevant to the real issue in the case. Whether they were at fault in not including the natural gas in the descriptions set forth attached to their Petition and whether they did not even think of or have any knowledge of that gas are equally beside the point. The real and only point is that they set forth to the Court as the Statute required a full and correct statement of all of the real estate of which they had knowledge and it was only that real estate thus described or some part thereof which the Court could lawfully authorize to be sold on their Petition. Even if, as we do not concede, the Executors may have wanted to sell real estate of which they had no knowledge, they could not lawfully secure authority to do so. The only way in which under the established procedure they could lawfully secure authority for the sale of real estate for the payment of Arnold's debts was to set it forth in their full and correct statement of his real estate and have the Court decide whether it or some part of it should be sold.

Appendix "D".

The fundamental error which, we submit, was made by your Honorable Court was to ignore the fact that a proceeding for the sale of real estate to pay debts under the Act of 1832 effects an involuntary taking away of property from its owners and that, therefore, there is no room in such a proceeding to apply, as your Honorable Court did (Opinion page 20), rules of construction applicable to the voluntary deed of a grantor himself disposing of his own property.

Under the Statute as construed by your Honorable Court it would now be possible to find that much valuable real estate of which neither the executors of estates or courts acting on their petitions had knowledge was long ago sold under petitions and orders which made no references whatever to them and without courts or executors or heirs or other parties in interest having any opportunity to question or contest the propriety of such sales. It is respectfully submitted, therefore, that this constitutional question which did not arise in this case until adjudication by your Honorable Court, requires a reargument of this case to permit a full and complete argument under the Federal Constitution.

Relative to this same matter of the Orphans' Court Petition and Order it is important, we believe, to point out that your Honorable Court seriously misread the Petition and Schedule of Real Estate attached thereto in the conclusion at page 19 of the Opinion that "Arnold's personal representatives both in their Petition and attached Schedule, did represent to the Court that they had listed *all* Arnold's interest in realty in Clearfield County." Reference to the Petition and Schedule will show that this is not what the

Executors represented. The representation was in the strict language of the Statute that what they were submitting to the Court was:

> "A full and correct statement of all the real estate of N. T. Arnold, deceased, situate in the State of Pennsylania, which has come to the knowledge of his Executors." (Schedule "C" attached to the Petition, Record page 58 (b).)

The prayer of the Petition was for the sale only of the real estate described in Schedule "C" (Record 52 (b)). Nowhere in the Petition and its attached Schedule did the Executors ask for the sale of any real estate except that which they specifically described as having come to their knowledge. The Decree authorizing a sale followed the Petition and Schedule "C" attached thereto exactly and precisely and authorized the sale of only the real estate "fully described in their Petition for leave to sell the same as Numbers I, II, VII, VIII, XXI, XXIII and XXIV and Number III with description as corrected" all exactly as set forth in Schedule "C" (Record 85b).

III

PENFIELD QUIT CLAIM DEED COULD NOT AND DID NOT CONVEY ANY REAL ESTATE THE SALE OF WHICH WAS NOT AUTHORIZED BY THE COURT'S DECREE ON THE EXECUTORS' PETITION.

This is true for two reasons.

First, if as recited in its preamble clauses (Record 118b) and as recognized by your Honorable Court (Opinion page 21), the purpose of the Penfield quit claim deed was merely to correct certain portions of the Arnold Executors' deed,

then the decision as to what that deed conveyed must be governed by the same constitutional limitations which are applicable to the Executors' deed and for the same reasons. The Executors' deed could convey nothing more than the Court's Decree authorized and the Court's Decree could authorized the sale of nothing more than the applicable statute (The Act of 1832) permitted. Construed to avoid repugnancy to the pertinent clause of the Federal Constitution, that Statute permitted the sale only of real estate fully described and set forth in the Petition. If the quit claim deed was merely to make corrections in the Executors' deed pursuant to the Order of Court then the quit claim deed too is limited to a quit claiming of interests lawfully conveyed pursuant to the Order of Court. To construe the quit claim deed as correcting the Executors' deed by conveying beneficial interests in land not described in the Executors' Petition would be another construction of the Act of 1832 as permitting the taking away of property without due process of law. Neither by the Executors' conveyance nor the quit claim conveyance can the beneficiaries of the Arnold Estate (ultimately his children and the Methodist Church) be deprived constitutionally of their property not described, considered by or acted upon by the Court in the 1909 Orphan's Court proceeding.

Second, if the quit claim deed is to be considered as standing on its own feet, wholly separate and apart from the Arnold Executors' deed, then it is abundantly clear that it also could not convey any property of the Arnold Trust Estate not previously covered by the Executors' deed. Analysis of the quit claim deed shows that there was expressed therein no consideration whatever therefor

except the fact that the Executors' deed had been given and the sum of $1.00 in hand paid to the Arnold Trustees who acknowledged receipt thereof. It is fundamental in our law that Trustees cannot bargain away or dispose of trust assets for no consideration or a nominal consideration such as $1.00. No one in this case has ever raised the issue that there was any new consideration passing to the Arnold Trustees for the quit claim deed except the $1.00 recited in that deed. While the proponent of a $1.00 deed has always been permitted under our law to show that there was a real consideration other than the recited $1.00, it has always been and is incumbent upon him to raise that issue and bear the burden of proving it. No one has raised that issue or attempted to meet that burden. If this had, the accounts of the Arnold Trustees would have quickly disposed of it.

To construe the Arnold Trustees' deed for $1.00 consideration as conveying away from the beneficiaries of the Arnold Estate the gas involved in this case would also effect a denial of due process under the Federal Constitution. No matter which way the quit claim deed is construed it is invalid to pass the title to the natural gas which is the subject matter of this case.

In *Beitler v. Nolde*, 34 Montgomery Law R. 197 at page 214 the law is stated as follows:

> "A trustee appointed to sell lands, cannot, by deed of *gift* or *deed* made upon a *merely nominal consideration*, *pass any title*." (Emphasis supplied)

In *Volume 90, Corpus Juris Secundum Trusts*, Section 298 (c) (p. 452) the law is stated as follows:

Appendix "D".

"*The sale will be deemed a nullity* where the trustee sells the property for no consideration, or no present consideration, or a *nominal consideration* or a grossly inadequate price." (Emphasis supplied)

CONCLUSION

It is respectfully submitted that a reargument of this case should be granted in order to permit a proper and adequate hearing on the substantial constitutional questions appearing on the face of the opinion of your Honorable Court.

Respectfully submitted,

/s/ JOHN A. METZ, JR.,
/s/ DAN P. ARNOLD,
Of Counsel for Petitioners.